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Supreme Court, U.S.
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No. 04-1431 MAR 15 2005

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In The

Supreme Court of the United States

NICHOLAS J. BENETIC, and SANDRA L. BENETIC, as Trustees of the Revocable BENETIC FAMILY TRUST – dated: September 22, 1993,

Petitioners,

v.

M/Y ATHENA ALEXANDER, Official No. 1083627 and her Engines, appurtenances, etc., **In Rem,**
AND
DIMITRI BIZOUMIS, ALEX KATS, VALERIE KATS & BAYPORT YACHTS, INC., a California Corporation, and DOES 1 through 10,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

NICHOLAS J. BENETIC & SANDRA L. BENETIC
Trustees of the Revocable
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QUESTIONS PRESENTED

1. Does the United States Court of Appeals for the Ninth Circuit in San Francisco, California have the right to **deny our petition in a "general"** denial without clearly evident substantial review of our case?

2. Does the Federal Ninth Circuit Court of Appeals in San Francisco, California have the right to **deny our petition to Publish, (by not answering our motion),** its decision as the case law for all citizens in the U.S. or is its decision only the special private individual law for petitioner. Is this, the law of the land or, is it law: for petitioner's only?

3. Do the three Ninth (9th.) Circuit Judges make the decision that the **case will not be heard "en banc"** and deny petitioners right of appeal?

4. Does District Court Judge Audrey B. Collins have the right to formulate a money judgment based on ***hearsay*** by defense?

5. Does District Court Judge Audrey B. Collins have the right to formulate a case in Admiralty wherein plaintiffs were **denied the right to cross examine witnesses?**

6. Does District Court Judge Audrey B. Collins have the right to formulate a case in Admiralty wherein the **vessel named in REM was not allowed to be arrested** by the U.S. Marshal in order to be legally and properly served as a named defendant, due to the **conspiracy of defense in personam counsel?**

7. Does District Court Judge Audrey B. Collins have the right to formulate a case in Admiralty wherein the Judge

QUESTIONS PRESENTED – Continued

allowed the attorneys for the in personam defendants acting in stead and without permission of the current vessel owner to place a ***verified fraudulent bond*** in lieu of arrest for the vessel named in rem (the vessel having being sold twice thereafter to third parties, the current owner was left out by the court in its right to defend its own vessel)?

8. Does District Court Judge Audrey B. Collins have the right to formulate a case in Admiralty wherein Judge Collins working in tandem with defense counsel refused to arrest the vessel named in rem and ordered that plaintiff's numerously serve the new owner(s) with **15-day-advance notice of intent to arrest causing owner to evade arrest,** in fact the owner then sold the vessel named in rem to another third party without notification that the vessel was named in rem in a federal action (the vessel was never arrested even though plaintiff's complied with the courts' exact orders numerously). Judge Collins did not want another lawsuit initiated by the vessels' owners causing defense in personam counsel to separately be sued: a violation of Federal Admiralty Rule "C"?

9. Does District Court Judge Audrey B. Collins have the right to formulate a case in Admiralty wherein she ordered plaintiffs to numerously delay trial (days before the first trial date and many other trial dates thereafter) and forcing plaintiff's pay for first class travel, lodging and meals for the Court "appointed" "neutral" expert to come out to California from Rhode Island in order to determine the repair costs of damages, **this *"special" court expert was in fact hired by defense* counsel in May 2000 (before the case was even filed)! This was a**

QUESTIONS PRESENTED – Continued

calculated and criminally conspired act between the defense counsel and Judge Audrey B. Collins, the record reflects this. Once confronted by this at trial, Judge Collins was silent. Does Judge Audrey Collins have the right to hire a defense employee as the courts' neutral expert?

10. Does Judge Collins have the right to work for defense counsel and third-party insurance company while working as a Federal Judge?

11. Does District Court Judge Audrey B. Collins have the right to formulate a case in Admiralty wherein Judge Collins allowed, at the "last minutes," defense counsel at first trial date to personally investigate with "**hearsay**" claimed doctors via telephone only to state that in personam named defendant Alex Kats would become "too ill, due to trial stress" to witness at trial. Plaintiff's had no right to talk to or, verify the validity, nor cross examine this "telephoned doctor" that defense counsel provided telephone number for (plaintiff's did not have the right to determine the validity of this "doctor"!). Does Judge Collins have the right to exclude plaintiff from this biased process by defense and the Court?

12. Does District Court Judge Audrey B. Collins have the right to formulate a case in Admiralty wherein she was in pre-disposition with cumis counsel John Petrullo and determinant that in personam defendant Dimitri Bizoumis would **not be liable for punitive damages** at the federal district civil trial as the result of his People of the State of California **convicted criminal actions** due to hit and run, failure to report, and subsequent gross

QUESTIONS PRESENTED – Continued

intentional negligence, causing a threat to the lives and property of others as the result of his selfish actions on June 27, 1999 and thereafter?

13. Does District Court Judge Audrey B. Collins have the right to formulate a case in Admiralty wherein she **totally excludes the testimony of plaintiff's expert witnesses at trial** (Mr. Hugo Carver – officer and founder of Knight and Carver Shipyard in San Diego, California – an internationally accredited vessel repair and manufacturing facility, which also performs work for the U.S. Navy and other governmental agencies) as to actual costs of damages to plaintiff's vessel?

14. Does District Court Judge Audrey B. Collins have the right to formulate a case in Admiralty wherein she issues a money judgment on hearsay by the defense "expert" Todd Schwede based on a "friendly" bid by Shelter Island Boatyard in San Diego, CA., a friend and landlord of Todd Schwede who never physically inspected plaintiffs' vessel and issued a fraudulent document for less than pennies of the real cost of repairs. Once Judge Collins issued a money judgment for this criminally fraudulent amount: plaintiffs wrote to Shelter Island Boatyard to come and get the vessel and repair it. Based on this fraud bid, the Boatyard wrote back refusing to now honor their written documents. Judge Collins was then advised via plaintiffs' motion and then ignored by Judge Collins via denial. Does Judge Collins have this right with hearsay?

15. Does District Court Judge Audrey B. Collins have the right to intentionally formulate a case in Admiralty wherein the plaintiffs/petitioners (the victims of criminal

QUESTIONS PRESENTED – Continued

activities by defense and its agent counsel from June 1999 to date) owe money damages to the defendants (the criminals) in further criminal conspiracy since November 2000?

16. Does District Court Judge Audrey B. Collins have the right to formulate a case in Admiralty wherein a ridiculous offer of judgment was made years after the incident by defense counsel knowing well in advance that the defense would have the trial manipulated to a final judgment for less than the offer made in order to recover defense costs as a final "stab in the back" of plaintiffs with the conspiracy of defense counsel and this rogue federal judge?

17. Does the District Court have the right to allow defense in personam to obtain a full satisfaction of judgment without their Markel Insurance Co. check for $17,736.37 being cashed by plaintiffs, on the courts' own volition?

18. Does the District Court have the right to not hear plaintiff's February 18, 2005 motion to order full satisfaction of judgment as to defendant's costs awarded post-judgment by the district court, having full payment being made by plaintiffs to defendants on January 12, 2005 in the amount of $14,152.39 with interest to January 15, 2005. Defendants refused to cash this check since it was made to defendants Kats and Bizoumis and not made out to Markel Insurance Co. (a non-party to this case): as the defense attorneys demanded without any basis of authority, another extortion and fraud by defense counsel – leaving a unresolved void in this case by the district court, thus causing further financial harm to plaintiffs each and

QUESTIONS PRESENTED – Continued

every day: with no option but to ask the Supreme Court for its opinion?

19. Does the lower court have the right to violate the Constitutional Rights of Plaintiffs/Petitioners under the color of law?

20. Does District Court Judge Audrey B. Collins have the right to hear this case wherein her husband is the Director of Los Angeles County Pediatric Dentistry and defendant Dimitri Bizoumis is a Pediatric Dentist, who also works at Rancho Los Amigos Hospital in Norwalk, California, a public entity of Los Angeles County. Mr. Bizoumis and Mr. Collins are both Pediatric Dentists, are both members of the same dental associations; they attend functions mutually, they know each other. Judge Collins was asked for numerously, to voluntarily-involuntarily recuse herself, yet refused, and no other judge wanted her cases?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts: The opinion of the United States Court of Appeals appears at Appendix – Exhibit *A* to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix – Exhibit B to the petition and is reported at American Maritime Cases as: *Benetic v. M/Y Athena Alexander*, 2002 AMC 297 (C.D. Calif. 2001).

JURISDICTION

For cases from federal Courts: The date on which the United States Court of Appeals decided my case was October 22, 2004.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: ***December 20, 2004***, and a copy of the order denying rehearing appears at Appendix – Exhibit C.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Protected Rights: U.S. Fourteenth Amendment

The Requirements of Due Process. – Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."

STATEMENT OF THE CASE

This case is the direct result of the violation of 33 CFR 173.57 (hit and run) on June 27, 1999 and the resultant conspired intentional and conspired malicious gross bad faith mutually conspired conduct of the defendants and each of them and their "agents" attorney's (et al.). Throughout this case and since June 27, 1999 the date of the criminal hit and run and failure to report, once defendants were found: Defendant Dimitri Bizoumis stated: ***"Oh Shit! How did you find me?"*** – a clear indication of his intent and actions, yet: the plaintiffs have initially requested that the defense simply "fix and repair" the damages caused by them to the plaintiff's vessel. **It is fact:** that the defendants always refused to simply "fix the vessel", therein forcing this litigation to commence on June 26, 2000 and continue through date. This case is the direct result of an intentional allission (defined as the collision of a moving (respondent's) vessel with a stationary (petitioner's) vessel) perpetrated by defendant Dimitri Bizoumis. Dimitri is an admitted incapable pilot of any vessel other than a "dinghy", that boarded his father-in-laws' (Kats who is, also unqualified to operate, without a professional captain) newly acquired vessel with gross negligence. Dimitri Bizoumis knew weeks beforehand

that the vessel he had control of, and had: "sent to sea" was in an unseaworthy state, as he states "the vessel had involuntary gas engine shut down problems". Dimitri also knew that he had no vessel piloting experience ever . . . Dimitri's father-in-law: Defendant Alex Kats, the purported vessel owner also knew at the time of the allission, that the vessel that he allowed to be operated by Dimitri, and his family (including their two minor children: the Kats' grand-children!) had at that time been unseaworthy, as the vessel in fact had engine problems and the fact that Defendant Dimitri was in fact an incapable pilot. Regardless to the vessel being "unseaworthy" and knowing that Dimitri was in fact a incapable pilot, the Kats, allowed Dimitri to operate it, thereby endangering the lives of everyone in the marina and in the general area (plaintiffs believe that this was done so that the Kats can commit insurance fraud and obtain a bigger and better diesel powered vessel as they have done. As verified by their own initial attorney, Mr. Phillip Chronis (who has since died due to undue stress from his clients) via consented voice taped conversation with Petitioners). Alex Kats then committed an act of gross negligence in sending an unseaworthy vessel to sea. 46 USC § 10908, (a crime). On June 27, 1999 the U.S. vessel M.Y. "Athena Alexander" in rem: operated by Dimitri struck the plaintiff's moored and stationary U.S. vessel the S.Y. "Buenos Aires" at an excessive rate of speed, "speeding" through the close confines of the marina the defendant's vessel locked up with Plaintiff's vessel. Dimitri rather than "shutting down" the Athena Alexander, continued to ram forward and reverse causing further damages with intent to flee the scene as witnessed by many in the area. A crime of "Hit and Run". After the "allission" Dimitri then proceeded to flee to the open water of the marina, all the while his wife and children screaming for help, after other witnesses

called the L.A. Port Police and the U.S. Coast Guard, L.A. County Lifeguards and L.A. City Fire Dpt. vessels responded, forced to matching his circling high speed course, shifting from forward to reverse at high speed, officers demanding in vain – ordering Dimitri to stop and shut off his engines, answering: ***"I don't know how!"*** wherein officers heroically boarded the vessel, forcefully shut the vessel down. His voyage was then terminated by the Los Angeles County lifeguards, and being unable to return to his mooring, was towed back, moored and the Bizoumis family quickly left the area without advising anyone of the incident. Local tenants stopped Bizoumis and told Bizoumis that he had hit the vessel "Buenos Aires", Bizoumis, shrugged them off and left. At this time plaintiff's vessel was taking on sea water from the allission damage to the below water keel to hull joint of their vessel. Bizoumis failed to advise the local authorities, simply left the scene of his crimes. It is fact: that the plaintiffs *were not* advised by defendants of the allission but rather by the concerns of the marina tenants. **It is fact:** that plaintiffs in the form of letter(s) asked **for an amicable resolution of the issue of the damages** to the plaintiffs vessel. **It is also fact:** that plaintiffs asked to "meet and confer" with Bizoumis and Kats to try to resolve amicably: the damages caused by Bizoumis at the Los Angeles Port Police Station in San Pedro. Defendants *never responded* to any of the total of five (5) letters over the time of one (1) year that Plaintiffs had sent, requesting an amicable resolution to the damages caused by Bizoumis. Bizoumis then retaliated maliciously and sued in civil court: his victim of his crimes: Mr. Nick Benetic "personally" falsely claiming harassment, as a tactical ploy to get out the pending state prosecuted criminal charges, instead of offering to fix and repair the damages he had caused. Dimitri rather than making restitution

for the damage he himself had caused, sued plaintiffs with malice for harassment. In that case Bizoumis acted with GROSS conspired intentional and malicious Bad Faith, with intent to mislead the court by committing several acts of perjury in his moving papers. The harassment case after six months and more than $35,000.00 spent in Benetic's defense and attorney costs was eventually resolved in the Benetic's favor and the Judge went further to state that Nick Benetic acted within his "constitutional protected rights" to try to resolve the allision damages caused by Bizoumis. The plaintiffs were now left with the only option, to sue Bizoumis and the vessel owners in the form of this Admiralty Action in the Federal Courts. **The plaintiffs, SIX (6) years later**, are now filing this petition for a writ of certiorari with the U.S. Supreme court as established codified U.S. Admiralty Law and U.S. Constitutional and other U.S. Law was not followed by the lower courts. **It is fact:** that the defense never performed any "competent survey" of the allission damage and the fraudulently conspired, San Diego area Shelter Island Boatyard, repair facility defense and district judge relied upon, ***never inspected the vessel***. The defense and district judge then proceeded and "drag out" plaintiffs for six years in this litigation with intent and in their hopes that the plaintiffs will simply "go away". **It has been since June 27, 1999 the allission, (the hit and run and failure to report crimes by defendant Bizoumis) and still without adequate dollars being given to plaintiffs for full restitution or any repair.** The defense never offered to repair and fix the damage they had caused and never worked with plaintiffs to mitigate the damages in fact they did the opposite. They hindered and obstructed. These conspired intentional gross bad faith acts caused additional financial harm and undue stress to Plaintiffs; all violating

the plaintiffs' civil and constitutionally protected rights... the same rights that plaintiffs fight for and that drove plaintiff Nick Benetic to voluntarily join and later be honorably discharged from the U.S. Army. From June 27, 1999 to date NO JUSTICE has been obtained in fact it has cost Benetic over $250,000.00 to get to this date, plus a loss of normal income (over $1.2 million) from July 1999 to date (March 2005) approximately six (6) years of undue and malicious stress due to gross bad faith by defendants, and additional other losses. Our attorney Richard Caillouette, Sr. died. **In fact:** Benetic (the victims-plaintiffs-petitioners) owe money to the criminals for their acts, thanks to unscrupulous rogue lawyers and rogue lower court judge(s). **In Admiralty Law:** ***The general rule "restitutio in integrum" To make the victim whole as if the incident had never occurred!*** **Hugo Carver was deposed and testified at trial as to the costs to repair our vessel.** This is a rule that is currently not disputed among the parties.

ARGUMENT

The rules "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. Thus, after the determination of the existence of a protected interest at issue, it must still be determined what procedure is adequate. Plaintiffs lost their right to due process, to the right of the protection of their property. ***Fact vs. law vs. opinion of lower courts re: general rule – Damages to the plaintiff's vessel, The general rule "restitutio in integrum"*** This is a rule that is currently not disputed among the parties. Brief history of "Restitutio in Integrum" this doctrine started in the Roman Empire, where Ticius did wrong to Caius. The

former had to compensate the latter by "Restitutio in Integrum". That meant and still means to this day, placing the victim of a breach of contract or a tortious act in the same position they were before the event. The Romans clearly understood the principal that the claimant must be put back to where they were before the damage was done to them, and this would never be achieved unless the victim was **fully compensated**, hence (in Integrum). Roman law, then, conceived "Restitutio in Integrum" be accomplished where the Claimant received the principal sum due, interests at a certain rate, compensation for their economic losses and the costs incurred by them in "seeking Justice". The general rule in admiralty for the recovery of damages due to the negligence of others is "Restitutio in Integrum", the damaged party is entitled to be put in as good a position pecuniarily as he was prior to the damage to his property occurring. *The Baltimore*, 75 U.S. 377 (1868); *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146 (1925); *BP Exploration and Oil Inc. v. Moran Mid-Atlantic Corp.*, 2001 U.S. Dist. LEXIS 8624 (D. N.J. 2001). The first principal in assessing damage in a maritime tort "is to place the injured person as nearly as possible in the condition he would have occupied if the injury *had not occurred.*" *Gaines Towing and Transportation Co. v. Atlantia Tanker Corp.*, 191 F.3d 633 (5th Cir. 2000); *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 1977 AMC 508 (5th Cir. 1976). The fundamental rule is "where property is destroyed by a wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good a position pecuniarily as if his property *had not been* destroyed" *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146 (1925); *Ryan Walsh Stevedoring Co. v. James Marine Services, Inc.*, 792 F.2d 489, 1987 AMC 1611 (5th Cir. 1986). *A&S Transportation Co. v. Tug Farjaro*, 668

F.2d 1, 1983 AMC 10 (1st Cir. 1982) held that the damages of a vessel were: the damages, consequential damages including incidental damages such as sue and labor costs reasonably incurred. **Plaintiffs were not made whole in this case, the lower courts made it possible for the defense to receive satisfaction of judgment without and before any funds being legally transferred to plaintiffs . . . the lower court also granted a fraudulent cost bill in favor of the defense. (It is fact that at the cost hearing plaintiffs exposed nearly half of the defenses' "so called costs" as fraud, Shortly after that, the court had the plaintiff Nick Benetic escorted out by the marshal, out of the hearing and continued Ex-parte with defense only, granting the rest of the fraud costs, out of plaintiff's rights to cross and defend.**

The International Convention **(Lisbon rules) Rule A:** these rules are available for adoption in cases where damages are claimed following a collision. **Rule B:** When a vessel is involved in a collision, these Rules shall apply to the assessment of the damages. **Rule C:** Subject to the application of the numbered rules the Claimant shall be entitled to recover such damages as may be reasonably considered to be the direct and immediate consequence of the collision. **Rule D:** Subject to the application of Rule C and of the numbered rules, damages shall place the Claimant in the same financial position as he would have occupied if the collision had not occurred. **Rule II – Damages to vessels:** In the event of the vessel being damaged but not being a total loss as defined in these rules, the claimant shall be entitled to recover as damages:

(a) the cost of temporary repairs reasonably effected, and the reasonable cost of permanent repairs. The cost of those repairs shall include but not be limited to the cost of any necessary dry docking, gas freeing or tank cleaning, port charges, supervision, and classification surveys, together with dry dock dues and or mooring, for the time occupied in carrying out such repairs.

(b) Reimbursements of sums, for which the Claimant has become legally liable and has paid to third parties in respect of such liability, arising out of the collision by reason of contractual, statutory or other legal obligations. The SOLE expert at trial to testify as to costs of repairs is plaintiff's expert, Mr. Hugo Carver – his deposition and testimony are of record. No one else could do so for the defense, except as hearsay. Defense had no defense.

The plaintiffs were further damaged by the Callous Disregard for the plaintiffs civil and constitutional rights, when the plaintiffs had no choice but to pursue this litigation. The plaintiffs were damaged by having to hire attorneys to defend themselves against frivolous harassment lawsuits that the defense initiated and attorneys for prosecution in the case in admiralty, Marina fees, surveyors, yard fees, haul-out fees, overhead expenses, losses to their normal business and personal lives, losses to Pursue Justice" etc. Plaintiffs were not made whole in this case: they were put in one!.... ***Survey and reclassification expenses.*** An owner's reasonable surveyor's fees incurred to surveying damage and to obtaining repair estimates are recoverable. *Bunge Corp. v. Freeport Marine Repair Inc.*, 240 F.3d 919, 2001 AMC 1367 (11th Cir. 1994); *In re Nichole Trahan*, 10 F.3d 1190, 1994 AMC 1253 (5th Cir. 1994); *Atkins v. Alabama*

Drydock and Shipbuilding Co., 195 F.Supp. 944, 1961 AMC 909 (S.D. Ala. 1960) **The plaintiffs have incurred surveyor's fees and contend that they are recoverable as to the "general rule". The trial court judge Audrey B. Collins did not award any compensation for surveyors, but did allow the defense their costs.**

Overhead expenses. Reasonable overhead expenses can be included in the cost of repairs and can be recovered, even if the injured party makes the repairs itself. *United States v. Peavey Barge Line*, 748 F.2d 395 (7th Cir. 1984); *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1327 (9th Cir. 1981); *South Central Bell Telephone Co. v. Merritt Dredging Co.*, 726 F. Supp. 1061 (S.D. Miss. 1989); *Shappert Engineering Co. v. Steel City Marine Transport, Inc.*, 620 F. Supp. 1377 (D. Mo. 1985)

Unrepaired Damage. The claimant can obtain an award for the reasonable cost of repairs even if the damage is not repaired. *The B.F. Guinan,* 40 F.2d 277, 1930 AMC 219 (E.D. N.Y. 1930); *United States v. Ship Owners and Merchants Tugboat Co.*, 205 F.2d 352, 1953 AMC 1259 (9th Cir. 1953); *Independent Bulk Transport Co. v. Morania Abalo*, 676 F.2d 23, 1982 AMC 1535 (2nd Cir. 1982); if the plaintiff chooses to or is unable to make repairs, . . . damages are therefore to be measured by the estimated cost of repairs following the accident.

Yarmouth Sea Products Limited v. Scully, 131 F.3d 389, 1998 AMC 825 (4th Cir. 1997), held that the estimated costs of repairs for a vessel involved in a collision may be awarded despite the fact that she sank from unrelated causes before the repairs were made.

Value Diminution. The rule in admiralty is that the cost of repairs is the equivalent of value diminution *Hewlett*

v. Barge Bertie, 418 F.2d 654 (4th Cir. 1969) *Proving the value of vessel Oliver J. Olsen and Co. v. Marine Leopard*, 356 F.2d 728, 1966 AMC 1064 (9th Cir. 1966). **If there is no recent and comparable sales or if the vessel is of unique features useable only in a restricted trade, a vessel may prove value by other evidence such as the opinions of marine surveyors, costs of reproduction less depreciation, and consideration of condition of repair, etc., to prove value, as above. The plaintiffs did in fact prove that the vessel was diminished in value yet the trial court did not allow the plaintiffs to recover anything in value that was in fact diminished. Plaintiffs were not "made whole" according to law.** . . . Also, the "general rule" is that the vessel owner can recover the actual reasonable cost of repairs, including overtime. *Bouchard Transportation Co. v. Tug Ocean Prince*, 691 F.2d 609, 1982 AMC 2944, 68 ALR Fed. 761 (2nd Cir. 1982). In this case it is true that the defendants have failed to provide any assistance in the repair process and have acted in total "gross bad faith" in that they failed to provide plaintiffs with any assistance in the repair process, rather they sued Plaintiffs for harassment when the plaintiffs tried to obtain their assistance and cooperation in the repair process. This conduct led plaintiffs to believe in the only option, to "Seek Justice" in the federal courts. The trial courts admit that the defense sued the victims of their crime of hit and run. This act was in fact done with malice and intent to injure the plaintiffs financially and before the plaintiffs could file their admiralty case. Yet the trial court did not allow the plaintiffs to introduce as evidence the entire case of harassment thereby shielding it from the record to the detriment of the plaintiffs and the advantage of the defense. . . . The plaintiffs have incurred overhead expenses and contend that these expenses are recoverable in the "general rule." The trial

court judge Audrey B. Collins did not award any compensation for overhead expenses although this same judge and the appellate court did allow the defense to recover its costs. . . . when the plaintiff was the one that was supposed to be made whole. . . . The trial court did not make the plaintiffs whole according to law, the plaintiffs still to this day cannot make the full and necessary legal repairs to bring their vessel back to its prior condition before the hit and run allision. . . .

Expert testimony hearsay rule competence of witnesses, *Todd's Schwede* (defense witness) *disclaimer vs. Mr. Hugo Carver's* (plaintiff's witness)

Plaintiffs found and contracted the Knight and Carver shipyard as their expert. It is also fact that the Knight and Carver shipyard maintains contracts with the U.S. Government and repairs vessels for the U.S. Navy, the U.S. Coast Guard and the U.S. Marines according to law and shipping standards. The courts order states defenses' Todd Schwede was the sole determination of the trial courts judgment, based on Todd Schwedes' testimony. The only problem with that is Schwede does not own, or work for, a actual repair yard, he works directly for the Markel Insurance Company. He obtained a verified false repair estimate from a yard known as the Shelter Island Boatyard, (his landlord and friend). The plaintiffs were never able to cross examine the Shelter Island Boatyard and the true drafter/writer of the defenses' criminally conspired fraudulent repair estimate representatives as they DID **NOT** EVER TESTIFY via deposition, nor come to trial to be cross examined under oath . . . Plaintiffs are entitled and required cross examination of Shelter Island Boatyard officers at trial but were not allowed by the district court to call them as witness since they would not come voluntarily and could not be forced via summons as

they were over 100 miles away. Plaintiffs moved that the court find that the Schwede **reports** and Shelter Island **Bid** be stricken as to the federal rules of evidence ***as hearsay*** **and as *incompetent and fraudulent. Plaintiffs were Ignored* ... It is fact:** the boat yard of the courts' and defenses' choosing does not meet standards to finish the repair of the Plaintiff's vessel. It is fact: that shortly after the judgment was issued the Shelter Island Boatyard was asked by plaintiffs if they would make good on their bid. The Shelter Island Boatyard refused stating their bid was void, in fact they did not want to even work on our vessel ever for any amount due to fear of litigation from their fraud bid! .... (the defenses bid was and is a fraud) and cannot be relied upon by the courts.... ***Facts of case summary (define Gross Bad Faith)*:** The definition of bad faith is the failure to meet an obligation or duty ... ***Bayport Yachts, Inc., U.S. Coast Guard issued title dispute*** **46 USC § 2131**

Facts of the case for the court with reference to the Bayport issue

Judicial Canon, ***Under Canon 3a(1)*** ***<u>Adjudicative Responsibilities</u>.***

A judge should be faithful to and maintain professional <u>competence in the law</u>, and should not be swayed by patrician interests, public clamor or fear of criticism.

The law of legal title **(46 USC § 31321)** Plaintiffs believe that when the court issued Summary Judgment against the plaintiffs and for Bayport was an act of incompetence in the law with intent to violate the plaintiff's civil and constitutional rights. The court ignored and ***still ignores*** the true facts in this case that: **Plaintiffs were**

the victims of a *"hit and run"* (crime) and not a party to and not aware of, the "so called" sale of the defendants vessel. (46USC § 31321).

a. The fact that the court never mentioned for the record that the "so called" sale transaction was a ***"nullified and rejected"*** sale by the Kats and Bayport defendants by returning the vessel and obtaining a full refund from Bayport by Kats. California UCC does not apply in Admiralty, * if it does the voluntary return and acceptance of the vessel in rem for a full refund applies as nullification and rejection of sale under California UCC. Therefore NO SALE took place, Bayport is liable as owner at the time of the incident of 06/27/99, Kats/Bizoumis merely borrowed the vessel from Bayport Yachts, Inc. – All share in liability for the 06/27/99 incident.

b. The fact that the "so called" sale was not legally completed until 07/08/99 well after the intentional allission, hit and run crime, and failure to report crime of June 27, 1999.

c. That the first application for legal title was ***fraud*** on the part of the defendants and was returned by the U.S Coast Guard.

e. That the defendant Bayport yachts committed an act of gross negligence in sending an unseaworthy vessel to sea 46 USC § 10908 (a crime).

f. That **NO sales taxes** were ever paid to the State of California evidencing any "so called" sale of the vessel named in rem.

g. The funds used to acquire the vessel came from checks issued from J and A Shoe Co. payable to Alex Kats – NOT

to Bayport Yachts, Inc.: a I.R.S. question to be answered by Mr. Kats to the U.S. Government.

h. The court used California state law when state law may not be applied by a federal court if it would defeat or narrow any substantial admiralty rights of recovery. State law may not be applied prejudice the characteristic features of maritime law or to disrupt the harmony it strives to bring to international and interstate relations.

i. It is fact that in a letter dated June 17, 1999 (well before the allission of June 27, 1999) from defendant Bayport Yachts and written by the President of the Bayport Yacht company Jack Means to defendant Alex Kats states in relevant part: ***"I assure you we will give you the best service you are entitled to. I am sorry you are having port engine problems. We should have insisted the yacht remain with Bayport until a Mercury Co. engine mechanic could adjust the engine and resolve this problem"***. When the court granted an "excessive" cost bill judgment against the plaintiffs and in favor of Bayport Yachts, Inc., is a violation of the plaintiff's civil rights and evidencing **bias and prejudice** ***a violation of (Judicial Canon 3(C)1(A)) and grounds for disqualification? Under (U.S.C Title 28) in admiralty and maritime claims taxation of costs cannot be allowed in this case unless promulgated by the Supreme Court.*** It is fact that at this point Judge Audrey B. Collins ***did not deny*** the Plaintiff's accusations and allowed the Bayport defendants to obtain an illegal cost bill. Bayport owned the vessel at the time of the allission via the U.S.C.G. the U.S. government, sent the plaintiffs the title report and NO transfer of title took place, yet district court Judge Collins violated ***The law of legal title*** (46 USC § 31321) (plaintiffs were victims of a hit and

run. Plaintiffs note that the defense still to this day never reported the allission to the USCG violating (33 CFR § 173.57) Bayport withheld pertinent evidence from the record that the "so called" sale transaction was a ***"nullified and rejected"*** sale by the Kats and Bayport defendants. Bayport withheld pertinent evidence and the Bayport attorneys lied to the court at the hearing on the Motion for summary Judgment. It is fact that **no taxes** were ever paid to the state of California evidencing the "so called" sale of the vessel in REM. ***Supreme Court Quotes*** . . .

After reference to article 1, 8, and article 3, 2, of the Constitution, we declared in (*Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215, 216, 37 S. Ct. 524, 528 (61 L. Ed. 1086, Ann. Cas. 1917E, 900) (1917)): "Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. . . . And further, that in the absence of some controlling statute, the general maritime law, as accepted by the federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. **Concerning extent to which the general maritime law may be changed, modified or affected by state legislation, this was said: 'No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of**

the fundamental purposes for which such [247 U.S. 372, 382] law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from (The Lottawanna,' 21 Wall. 558, 575 (22 L. Ed. 654)." ***Points made and ignored on appeal***

Plaintiffs filed their appeal with the Ninth Circuit Court of Appeals and it seemed to the plaintiffs that Ninth Circuit did not even bother to read the case. Also the plaintiffs moved to the Ninth Circuit Court to publish their decision so that their law can be case law for all, and they ignored the plaintiff's motion, no response to plaintiffs addressing the motion for publication of the case. . . . apparently the law in plaintiff's case is only made up and invented to violate the plaintiffs individually, what happened to the plaintiff's constitutionally protected rights.

Judge and defense and counsel conspired against plaintiff's constitutional rights

Objection to the court's order dated April 29, 2003 and entered on May 1, 2003

The plaintiffs were never able to cross examine the Shelter Island Boatyard and the true drafter/writer of the defenses' fraud repair estimate representatives as they did not testify under oath. . . . Plaintiffs were not allowed examination at trial. ***Evidence code (hearsay) right of cross examination*** Hearsay by (***Federal rules of evidence code 802***) is illegal, the lower courts used absolute hearsay for the sole basis of their judgment . . . plaintiffs did not have the right to cross examine. Plaintiffs moved the court find that the Todd Schwede **reports** and Shelter Island **Bid** be stricken as to the federal rules of evidence

as ***hearsay*** and as ***incompetent and criminally fraudulent. Plaintiffs were Ignored. – Judicial Canon –***

Judicial Canon 2 states: (A) A judge should respect **and comply with the law** and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. **Actual improprieties under this standard include violations of law, court rules or other specific provisions of this code.** ***The judges ability to carry out judicial responsibilities with integrity, impartially, and competence is impaired.*** The Plaintiffs believe in the correction of the impropriety as to *Canon 3b*(3). A Judge *should initiate appropriate action* when the judge becomes aware of reliable evidence indicating: *likelihood* of unprofessional conduct by a judge or lawyer. Initiating the appropriate action would be the proper way to handle the Plaintiff's Motion to Disqualify., ***AND reporting the violation to the proper authorities.*** Plaintiffs believe that the obvious ***conspiracy against rights*** a crime under (title 18) of the US code constitutes ***a personal bias or prejudice concerning a party*** and is grounds for an official investigation of the Judge to a Senate Judiciary Oversight Committee. Without even an answer or response for the record to each and every allegation contained in the Plaintiff's Motion to Disqualify Judge Audrey B. Collins the Motion was denied, covered up, with the assistance of other friendly district Judges. **(a political response) Judicial Canon 3 states: A Judge Should Perform the Duties of the Office Impartially and Diligently.** The Judicial duties of a Judge take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

(A) ***Adjudicative Responsibilities.***

(1) A judge should be faithful to and maintain professional competence in the law, and should not be swayed by patrician interests, public clamor or fear of criticism.

. . . *JUSTICE DELAYED IS JUSTICE DENIED!!!*

Plaintiffs were ready for the trial on the first trial date of September 2001 and objected to the delay of the case by the defense and the court. Plaintiffs understand how and why the case has been delayed so many times and state for the record that if the trial had commenced in September of 2001, then there would have been no other issues to this court to decide. Since this case has been unnecessarily delayed, the plaintiffs could not afford any more attorneys fees beyond the September 2001 date that constitutes a unfair advantage to the defense, and the true reasons for the judges continuous delay. This delay was to force plaintiffs to accept Mr. Bruce Pfund as the courts' expert, later found to have been hired by defense counsel before Plaintiffs even filed the litigation – ***A CRIME!*** This "so called admitted liability case has been going on for over five years since the intentional allission incident. It is fact that the case file consists of over 13 volumes and the trial has been postponed about six times to favor the defense attorneys and their income. It should also be noted as fact, that the district judge stayed the case, and under threat of dismissal, all with intent to extort monies from plaintiffs. Canon 3a(5). Judge Audry B. Collins ***did not*** **demonstrate** ***due regard for the rights of the Plaintiffs.*** Plaintiff's note for the record: ***The bond in lieu of arrest that the court relies on is fraud.*** The bond that the court accepted and condones from the defense is fraud on

the part of the defense. The bond authorization is dated in the year of 1997 by officers that do not work for the Hartford Insurance Company and in fact does not apply for the date of May, 2002. Plaintiffs believe that the defense issued for the record a bond that is fraud and the court allowed and condoned this act of fraud by accepting the bond in lieu of arrest. *It is fact that the plaintiffs* ***never accepted*** *the fraudulent bond according to the* ***Federal Admiralty Rule C.*** The fact that the defense filed a illegal bond with this court constitutes another crime by the defense with assistance of Judge Audrey B. Collins . . . Under F.R.C.P 34 local rule 6.2.4 (26-6.2.4) any insurance agreement under which any insurance carrier may be liable to satisfy part or all of a judgment shall be made available for inspection and copying. The court accepted a bond from monies from an insurance fraud under objection of the plaintiffs. The defense policy is not endorsed by an authorized officer and is not valid by the documents own omission. It is fact that the plaintiffs were not allowed by the defense or the court to inspect the defense insurance policy documents and the *court ordered* that the plaintiffs not contact the defense insurance company even though the Markel Insurance Company is **not a party**. Plaintiffs believe that this is an act of a criminal conspiracy to cover up the defenses' fraud, *and a violation of the plaintiff's right to investigate, and cross examine the insurance policy.* **Not arresting the vessel named in REM.**

It is fact that the court refuses to arrest the vessel named in REM even though it is a prerequisite to this maritime claim. The defenses' Bond is conditioned to an answer on behalf of the vessel otherwise it becomes void. It is fact that for the record there is no answer on behalf of the vessel and the plaintiffs have filed for the court to

issue default judgment. Shortly thereafter the court stated that default judgment is moot. Plaintiffs have objected to the courts labeling of moot and the court has yet to respond. Plaintiffs also believe that the court should have immediately ordered the vessel arrest and then had Mr. Kluko, the vessel owner at that time, issue a bond in lieu of arrest as required by law and at a post-arrest hearing in front of the court. Plaintiffs believe that the court has created an unfair advantage for the defense and gave Mr. Kluko a 15-day opportunity to disappear and evade arrest. Mr. Kluko has done so, SOLD the vessel to another, and Judge Collins helped him get away . . .

Under Cannon 3a(1) Adjudicative Responsibilities.

> *A judge should be faithful to and maintain professional competence in the law, and should not be swayed by patrician interests, public clamor or fear of criticism.*

This court cannot make law only interpret the law. Judge Collins invented her own Admiralty Law and therefore does not maintain competence in the law. Any rules a Judge makes shall be consistent with the law and not contradict the law. Any rules a Judge makes shall not abridge any substantive right (Title 28 U.S. Code).

Any rule prescribed by a court other than the Supreme Court shall be prescribed only after giving appropriate public notice and an opportunity for comment.

It is fact that at this point Judge Audrey B. Collins ***did not deny*** the Plaintiffs' accusations.

The Bayport issue Under Canon 3a(1) Adjudicative Responsibilities.

A judge should be faithful to and maintain professional competence in the law. The law of legal title (46 USC § 31321) Plaintiffs believe that when the court issued summary judgment against the plaintiffs and for Bayport was an act of incompetence in the law with intent to violate the plaintiff's civil and constitutional rights. **The court ignored and still ignores the true facts in this case that:** Plaintiffs were the victims of a "hit and run" (crime) and not a party to and not aware of, the "so called" sale of the defendants vessel. **(46 USC § 31321).**

The fact that the court never mentioned for the record that the "so called" sale transaction was a **"nullified and rejected"** sale by the Kats and Bayport defendants.The fact that the "so called" sale was not completed until 7/8/99 well after the allission of June 27, 1999. That the first application for legal title was fraud on the part of the defendants and was returned by the U.S. Coast Guard. That the defendant Bayport yachts committed an act of negligence in sending an unseaworthy vessel to sea 46 USC § 10908, (a crime ignored by Judge Audrey B. Collins. That **no taxes** were ever paid to the state of California evidencing the "so called" sale and no legal sale took place . . . The court used state law when state law may not be applied by a federal court if it would defeat or narrow any substantial admiralty rights of recovery. State law may not be applied prejudice the characteristic features of maritime law or to disrupt the harmony it strives to bring to international and interstate relations. Judge Collins' ***Hozie*** case does no apply to this case as Plaintiffs had NO knowledge of any sale prior to 07/08/99, especially since

the sale was nullified and rescinded by the parties in August 1999. (*See: Hozie v. Vessel Highland Light*, 1998 AMC 2829 (C.D. Ca. 1997) a case in which Judge Audrey Collins was the judge.

When the court granted an "excessive" cost bill judgment against the plaintiffs and in favor of Bayport yachts is a violation of the plaintiff's civil rights and evidencing **bias and prejudice.** ***A violation of (Canon 3(C)1(A)) and grounds for disqualification Under (U.S.C. Title 28) in admiralty and maritime claims taxation of costs cannot be allowed in this case unless promulgated by the Supreme Court.*** ***Unecessary appointments.*** Mr. Bruce Pfund was an unecessary appointment, the plaintiffs have the sole burden to prove their damages, and were ready to do so since September 2001 when the trial was to commence. Plaintiffs believe that the court only ordered the appointment of Mr. Pfund because the defense had *no* defense and needed the vessel to be inspected again since they failed to perform a proper survey in July of 1999. In July of 1999 the plaintiffs burdened themselves with yard fees, haul out fees, transportation fees, supervision fees, and their time all to allow the defense to inspect the damage caused by the defense. Yet the court made the plaintiffs burden themselves again and unecessarily with Pfund and failed to burden the defense with these same costs, evidencing the courts **bias and prejudice.** ***A violation of (Canon 3(C)1(A)) and grounds for disqualification. Mr. Bruce Pfund was hired by defense in the summer of 2000. Judge Collins erred in this conspired appointment in fraud!*** ***Survey and reclassification expenses.*** An owner's reasonable surveyor's fees incurred to surveying damage and to obtaining repair estimates are recoverable.

Bunge Corp. v. Freeport Marine Repair Inc., 240 F.3d 919, 2001 AMC 1367 (11th Cir. 1994); *In re Nichole Trahan*, 10 F.3d 1190, 1994 AMC 1253 (5th Cir. 1994); *Atkins v. Alabama Drydock and Shipbuilding Co.*, 195 F.Supp. 944, 1961 AMC 909 (S.D. Ala. 1960); *United States v. Peavey Barge Line*, 748 F.2d 395 (7th Cir. 1984); *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1327 (9th Cir. 1981); *South Central Bell Telephone Co. v. Merritt Dredging Co.*, 726 F. Supp. 1061 (S.D. Miss. 1989); *Shappert Engineering Co. v. Steel City Marine Transport, Inc.*, 620 F. Supp. 1377 (D. Mo. 1985). The plaintiffs have incurred many expenses and contend that these expenses are recoverable in the "general rule" plaintiff was the one that was supposed to be made whole. . . . *The Baltimore*, 75 U.S. 3777; *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146 (1925); *BP Exploration and Oil Inc. v. Moran Mid-Atlantic Corp.*, 2001 U.S. Dist. LEXIS 8624 (D. N.J. 2001). The first principal in assessing damage in a maritime tort "is to place the injured person as nearly as possible in the condition he would have occupied if the injury had not occurred." *Gains Towing and Transportation Co. v. Atlantia Tanker Corp.*, 191 F.3d 633 (5th Cir. 2000); *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 1977 AMC 508 (5th Cir. 1976). The fundamental rule is "where property is destroyed by a wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good a position pecuniarily as if his property had not been destroyed", *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146 (1925); *Ryan Walsh Stevedoring Co. v. James Marine Services, Inc.*, 792 F.2d 489, 1987 AMC 1611 (5th Cir. 1986); *A&S Transportation Co. v. Tug Farjaro*, 668 F.2d 1, 1983 AMC 10 (1st Cir. 1982). It is fact that the court would not charge the defense with the fees and costs associated to a so called court appointed survey of the

vessel and the court ***yelled*** at the plaintiffs when the plaintiffs made the court aware of the costs. Plaintiffs are tired of paying for the incompetent conspiring acts of the defense and the court especially since this is a "so called" "defense admitted liability case". *Cannon 3(B)* ***Administrative Responsibilities***. *Canon 3B(3)* ***reporting the violation to the proper authorities***. ***Canon 3B(4) A judge should not make unnecessary appointments and should exercise that power only on the basis of merit, avoiding nepotism and favoritism. The Pfund issue*****: Plaintiffs note, fact, during cross examination at trial of Pfund the courts appointed expert the plaintiffs found that the defense and the court and Pfund were in ex parte communications *without the plaintiffs* knowledge and during this time it became apparent they were conspiring against the plaintiff's rights (a U.S. Title 18 crime).** The fact is, that there is and at that time was, well over fifty well qualified surveyors in the court district.Pfund constitutes a unfair advantage to the defense. For the court to appoint an expert well over 3,000 miles away constitutes a unreasonable cost that the court later tried to **extort** from the plaintiffs, under **threat** of the entire case being dismissed in favor of the defense. This act on the courts part caused the plaintiffs to file an appeal. The defense was the only party that demanded an expert and in the last days before the September, 2001 trial date. The court allowed the defense ex-parte communications with courts expert, who was at all times pre-hired by defense. ***The court allowed, and, condoned the courts'-defense expert to include charges such as alcohol and first class airfare in his bill for his services to plaintiffs.*** It is fact, that the plaintiffs video taped the Pfund survey and that Mr. Pfund is a "so called self-appointed expert with no composites

work experience and a degree in liberal arts" limited to composite structures, NOT a surveyor, NOT a person qualified to determine the costs of damages, does not own nor work for any ship repair facility, and NOT a sail **rigging expert**, yet the court still choose Pfund in conspiracy with defense counsel to drag out the case and force Benetic to take a ridiculous less than pennies vs: dollars settlement and GO AWAY! Pfund was chosen because defense had NO defense and only to delay the case from being tried in 09/2001, so that defense could think further on how to detriment Benetic. It is fact that the plaintiff's son was ordered by Mr. Pfund to perform certain duties that Pfund could have done himself and plaintiffs believe that Pfund was not capable to handle all of his duties himself at the time of the survey because the court never advised Pfund of his duties according to law. (***Under federal rules of Evidence Code 706 et al.***). It is fact that the plaintiffs never requested this expert and paid more than their share for his services, yet the court threatened the plaintiffs to dismiss their complaint to the advantage of the defense. The plaintiffs were then forced to appeal and the court later stated that it was the plaintiff's fault for the delay when it is true fact that this court refused to manage the case to avoid the delay and therefore is the courts fault for that delay. The court stated that the purpose of Pfund was to determine a dollar amount. Mr. Pfund never did so and cannot due to the fact "HE IS NOT CAPABLE" and does not own a repair yard thus cannot figure a dollar amount. Pfund ordered the plaintiff's vessel hauled out via marine railway, blocked on stands, hydro washed, and scaffolding erected all around, and was ready to drill 3" holes into various areas of the hull further damaging our vessel as part of his inspection all costs associated and as part of the Pfund survey.

Plaintiffs refused any hole drilling and damages to the vessel. It is fact that plaintiffs paid in excess of what it was ordered and the court failed to mention these facts for the record. It is fact that at this point Judge Audrey B. Collins ***did not deny*** the Plaintiff's accusations. ***Canon 3(C) Disqualification. (1) A judge shall disqualify himself or herself in a proceeding in which the judges impartiality might reasonably be questioned, including but not limited to instances in which: (a) the Judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. Unfair advantages to the defense.*** The court has allowed several unfair advantages to the defense including but not limited to: The court delayed this case as to cause the plaintiffs undue financial harm. The court has caused the plaintiffs to not be able to afford any legal representation. The court has let defendant Bayport off of their crimes of titling negligence and sending an unseaworthy vessel to sea. (See Bayport Issue)The court refuses to arrest the vessel named in REM even though the defense bond is fraud and Plaintiffs *did not* accept. ***(pursuant to Admiralty Rule C)*** Plaintiffs were ordered to give notice of intent to arrest the vessel in REM when plaintiffs believe there is *no such requirement*. The court allowed the defense to file ex-parte relief from the notice to arrest when the defense was not a legal owner of the vessel in REM at that time. The vessel was never represented by its true owner. (the court allowed misrepresentation of the vessel in REM). The court limits the plaintiff's case to a time limit using a stopwatch, yet the plaintiffs have a greater burden and as such need more time to litigate than the defense. For the court to impose a time limit on the plaintiffs creates an unfair advantage for the defense and their

18 attorneys. It is fact that the court stated that the plaintiffs will not have the time to call all of its experts and witnesses. It is fact that the plaintiffs have over one hundred witnesses to call and the defense does not. Eight hours for a trial of this size is not enough time and is unfair to the plaintiffs to whom have the burden of proof. The court has stated several times that this case is limited to the dollar amount of the damages to the vessel and that the defense has admitted liability to the complaint. The court has assisted the defense in the manipulation of the discovery process and did not allow the plaintiffs a fair opportunity to fair discovery. It is fact that the plaintiff believes that they are the victims of ex-parte communication and conspiracy between the court and the defense. It is fact that the plaintiffs were denied the proper discovery by the defense and this court and it is fact that the court will not allow the plaintiffs the proper time for the plaintiffs to call all its witnesses to satisfy their burden of proof and have a fair trial. It is fact that the court led the plaintiffs to believe that the defense admitted liability and therefore the court limited the case to the dollar amount of damages when in fact the plaintiffs require to be made whole. Plaintiffs believe that the court is not allowing the plaintiffs their legal right to a fair trial. Admiralty law states that restitutio in integrum is the first rule in admiralty law, yet this law was in fact ignored . . . The court allows the Kats defense to represent the vessel in REM when they do not own it . . . nor have permission from the owners . . . **Only allowing one expert to plaintiffs and allowing defense two.** The court in the proceeding of April 2002 states that the case should only have three expert testimony – one per side – and Pfund shortly thereafter the court allows the defense to utilize the "so called" courts expert. Pfund was a defense expert even before he became a courts expert, and

now is the defense expert. The court also allowed the defense to advise the courts expert of his duties when the law states that the court should advise the courts experts of their duties and file them for the record. The court violated evidence rule 706, and conspired with the defense against the plaintiffs on the Pfund issues. Plaintiffs believe that the obvious ***conspiracy against rights*** a crime under ***(title 18)*** of the US code constitutes ***a personal bias or prejudice concerning a party***. It is fact that at this point Judge Audry B. Collins ***did not deny*** the Plaintiff's accusations. ***How can a Judge that is biased against your rights hear and solel y decide your case with no Jury?*** . . . It is fact that at this point Judge Audrey B. Collins ***did NOT deny*** or challenge the Plaintiff's accusations. ***Plaintiffs State that Under (U.S. Code Title 28) rules made by courts cannot be inconsistent with Acts of Congress and the Supreme Court and such rules shall not abridge any substantive right, in Maritime Cases court rules have to abide by international relations and should not defeat or narrow any substantial admiralty rights of recovery and may not be applied prejudice the characteristic features of maritime law or to disrupt the harmony it strives to bring to international and interstate relations.*** In this case Judge Collins invented new law for the unfair advantage of the defense. **John F. Kennedy once said an error is not a mistake until its refusal to be corrected.**

REASONS FOR GRANTING THE PETITION

To ensure that the constitutional rights in this country extend to each and every citizen. Uniformity of the courts and law, equal rights for all, in accordance with established law of the land. The Rule of Law must be

upheld in equality to all citizens. There is much more to say. Petitioners pray for justice.

CONCLUSION

The petition for a writ of certiorari should be granted. Petitioners pray for justice in equality as U.S. Citizens under rights reserved under the Constitution of the United States of America, and that the Supreme Court clean up, resolve, and correct the lower court's sins and errors. Justice delayed is justice denied, clearly evident by the lower courts herein. That petitioners be granted a new trial, preferably in another district (such as the Fifth District) or any other district wherein U.S. Admiralty cases can be judicially and be politically unbiased, heard in fair justice for all, away from the Central District of California and the Ninth Circuit. There is much more to be said, we are ending this due to page limitations. Petitioner's submit to this honorable court and await respectfully: **justice.**

Respectfully submitted,

NICHOLAS J. BENETIC – trustee

SANDRA L. BENETIC – trustee
The Revocable Benetic Family Trust dated 09/22/1993
NICHOLAS J. BENETIC – trustee
SANDRA L. BENETIC – trustee Petitioners

Date: March 15, 2005

APPENDIX

Page

United States Court of Appeals for the Ninth Circuit Order on case # 03-56441 dated filed October 22, 2004 and received by Plaintiffs/Appellants on January 3, 2005 AFFIRMING the District Court Judgment of August 6, 2003 .....App. 1

U.S. District Court – Central District of California ORDER – Findings of Fact and Conclusions of Law after Court Trial by Judge Audrey B. Collins for case # CV 00-06845 ABC (EX) In admiralty dated August 6, 2003 filed by Clerk Docketed as # 300 on 08/07/03 Received by Plaintiffs 08/08/03 .....App. 5

United States Court of Appeals for the Ninth Circuit Order on case # 03-56441 dated filed December 20, 2004 and received by Plaintiffs/Appellants on December 24, 2004 DENYING petition for re-hearing en banc and no order to date as to Appellants motion for publication of the Affirmed Judgment of October 22, 2004.....App. 55

EXHIBIT A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICHOLAS J. BENETIC and SANDRA L. BENETIC, as Trustees of the Benetic Family Trust dated September 22, 1993, Plaintiffs-Appellants v. M/Y ATHENA ALEXANDER, Official No. 1083 627 and her engines appurtenances etc, in rem; et al., Defendants-Appellees.	No. 03-56441 D.C. No. CV-00-06845-ABC MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Submitted October 14, 2004**

(Filed Oct. 22, 2004)

Before: KLEINFELD, TASHIMA, and GOULD, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Nicholas and Sandra Benetic, on behalf of their family trust, appeal pro se the district court's judgment and post-judgment orders in their maritime action seeking damages caused when M/Y Athena Alexander allied with S/V Buenos Aires on June 27, 1999. We have jurisdiction under 28 U.S.C. § 1291. We review de novo summary judgment, *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003), questions of law in admiralty, *Howard v. Crystal Cruises, Inc.*, 41 F.3d 527, 529 (9th Cir. 1994), and selection of the legal standard for computation of damages, *id.* at 530. We review for clear error the factual findings of a district court sitting in admiralty, *Chan v. Society Expeditions, Inc.*, 123 F.3d 1287, 1290 (9th Cir. 1997), and the computation of damages following a bench trial, *Howard*, 41 F.3d at 530. We affirm.

The district court correctly determined that Bayport Yachts, Inc., did not have an ownership interest in, or title to, M/Y Athena Alexander at the time of the allision and therefore properly granted summary judgment dismissing Bayport Yachts, Inc. *See Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

The district court correctly assessed the cost of repair to the Benetics' vessel, *see Stevens v. F/V Bonnie Doon*, 731 F.2d 1433, 1436 (9th Cir. 1984), correctly denied damages for lost profits, *see Fireman's Fund Ins. Cos. v. Big Blue Fisheries, Inc.*, 143 F.3d 1172, 1177 (9th Cir. 1998), correctly denied damages for loss of use, *see Oppen v. Aetna Ins. Co.*, 485 F.2d 252, 257 (9th Cir. 1973), correctly denied attorneys fees, *see B.P. North America Trading, Inc. v. Vessel Panamax Nova*, 784 F.2d 975, 977 (9th Cir. 1986), correctly awarded prejudgment interest reduced by the period of undue delay caused by the Benetics' appeals to this Court, *see Dillingham Shipyard v. Associated Insulation Co.*,

Ltd., 649 F.2d 1322, 1328-29 (9th Cir. 1981), and correctly denied punitive damages, *see In re Marine Sulphur Queen*, 460 F.2d 89, 105 (9th Cir. 1972).

The district court did not err when it ordered defendants to post a security bond in lieu of issuing a warrant for the arrest of M/Y Athena Alexander. *See* Fed. R. Civ. P. C(3)(a)(ii)(A), E(2)(b), E(5); U.S. Dist. Ct., Central Cal., Local Rule II(C)(1); *Alyeska Pipeline Serv. Co. v. Vessel Bay Ridge*, 703 F.2d 381, 384 (9th Cir. 1983).

The district court did not abuse its discretion when it made its evidentiary rulings. *See McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir. 2003).

Appellants' remaining contentions, including those of judicial bias, are without merit.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICHOLAS J. BENETIC, as Trustee of the Benetic Family Trust dated September 22, 1993; et al., Plaintiffs-Appellants, v. M/Y ATHENA ALEXANDER, Official No. 1083 627 and her engines appurtenances etc, in rem; et al., Defendants-Appellees.	No. 03-56441 D.C. No. CV-00-06845-ABC **JUDGMENT**

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered Friday, October 22, 2004

EXHIBIT B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS J. BENETIC and SANDRA L. BENETIC, as Trustees of the BENETIC FAMILY TRUST. Plaintiffs, v. M/Y ATHENA ALEXANDER, et al., Defendants.	Case No. CV 00-06845 ABC (Ex) **FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER COURT TRIAL** (Filed Aug. 6, 2003)

This admiralty case arises from the allision of the M/Y Athena Alexander (the "Athena Alexander") with the S/V Buenos Aires (the "Buenos Aires") on June 27, 1999 in the Cabrillo Marina in San Pedro, California. Plaintiffs Nicholas J. Benetic and Sandra L. Benetic, as Trustees of the Benetic Family Trust dated September 22, 1993 ("Plaintiffs"), sued the Athena Alexander in rem; Dimitri Bizoumis, who piloted the Athena Alexander on the day of the allision; Alex Kats, Mr. Bizoumis's father-in-law; Valerie Kats, Mr. Bizoumis's mother-in-law, and together with Mr. Kats, owner of the Athena Alexander (collectively, "Defendants") and Bayport Yachts, which sold the Athena Alexander to the Kats. Bayport Yachts was dismissed before trial. The remaining Defendants admitted liability for the allision before trial.

The court trial was therefore limited to the issues of Plaintiffs' recovery for damages, namely the amount of recovery due for repairs and any other possible categories

of loss, and Plaintiffs' claim for punitive damages against Defendant Dimitri Bizoumis. The court trial was held before the Honorable Audrey B. Collins, District Judge presiding, over three days from June 10, 2003 through June 12, 2003.

Plaintiff Nicholas Benetic, acting as *pro se* counsel for the Plaintiff Benetic Family Trust, called the following witnesses: Patrick Dixon; Ishkhan "Ara" Gordian; Mary Bacon; Thomas W. Bell; William Engstrom, whose deposition was offered as his direct testimony; Hugo Carver; Leah Bizoumis; Dimitri Bizoumis, whose deposition was also offered as direct testimony; Werner Kindor; Joseph Benetic, Nicholas Benetic's son and Nicholas Benetic. The Court also admitted the deposition of Angelo B. Krakoff, who was unavailable for trial, and allowed Plaintiffs to recall Mr. Bizoumis, as will be explained below.[1]

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[1] Plaintiffs also listed Defendant Alex Kats on their witness list. On the morning of trial, the Defendants filed the Declaration of defense counsel Joseph Cho re: Unavailability of Alex Kats. Exhibit A to the declaration consisted of three letters from doctors who were of the opinion that the stress of trial would exacerbate Mr. Kats's coronary disease. The letters attested that Mr. Kats had undergone multiple coronary procedures including angioplasty, stents and brachytherapy. (Decl. of Joseph Cho, Ex. A.) The strongest letter was from Dr. Wyman, who stated "[Kats] should not be allowed to testify in court due to his heart related health issues." *Id.* The Court spoke with Dr. Wyman by telephone in court in the presence of all counsel. (Whenever used, the term "counsel" includes Mr. Benetic.) Although the Court told Dr. Wyman she would limit the time and intensity of Mr. Kats's testimony if he were to be called, Dr. Wyman did not change his view. Therefore, the Court declared Mr. Kats to be unavailable pursuant to Federal Rule of Evidence 804(a)(4). After proffers from Mr. Benetic and a brief review of Mr. Kats's deposition, the Court indicated that it doubted Mr. Kats's testimony would be relevant; however, the Court offered repeatedly, as late as just prior to closing argument, to consider the parties' requests

(Continued on following page)

Defendants called the following witnesses: Bruce Pfund and Todd Schwede.

Closing arguments were made on June 12, 2003, and the case was submitted at that time.

At the close of Plaintiffs' case, Defendants moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 on the issue of punitive damages. Because the Court did not prepare a separate order, this order will encompass the Court's reasons for granting Defendants' motion dismissing the punitive damages claim.

Having considered all the evidence submitted and the arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. Pro. 52(a).

I. PROCEDURAL HISTORY

1. On June 26, 2000, Plaintiffs filed a complaint in this Court alleging the following claims in admiralty against the Athena Alexander, Dimitri Bizoumis, Alex Kats, Valerie Kats and Bayport Yachts: negligent navigation, unseaworthiness, negligence after allision[2] and trespass to chattels.

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that the Court admit pertinent portions of his testimony and to rule on any objections. Neither party availed itself of this option.

[2] Allision means "[t]he running of one vessel into or against another, as distinguished from a collision, *i.e.*, the running of two vessels against each other. But this distinction is not very carefully observed." *Black's Law Dictionary*, 5th ed. at 69 (1979).

2. Defendants Bizoumis and Alex and Valerie Kats filed a motion to dismiss and to strike pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(f) on August 1, 2000, which this Court denied on November 1, 2000.

3. On December 18, 2000, the Court set the matter for final pre-trial conference on September 10, 2001 with the trial set to begin on September 25, 2001.

4. Defendants made an Offer of Judgment in the amount of $30,000 on June 20, 2001.

5. On July 5, 2001, Defendant Bayport Yachts filed a motion for partial summary judgment, which this Court granted on August 13, 2001, dismissing Plaintiffs' claims against Bayport Yachts for negligent navigation, unseaworthiness and negligence after allision.

6. On August 13, 2001, the Court ordered counsel to meet and confer regarding the issue of choosing an independent and neutral expert and to file a joint report describing the results of their meeting. Unable to agree on an expert, on September 5, 2001 the parties submitted a joint report which included the résumés of three surveyors and requested that the Court choose one to act as the Court's expert and decide how the expert would be paid, as the parties were also unable to agree on that issue.

7. After carefully reviewing the qualifications of each candidate, on September 7, 2001, the Court appointed Mr. Bruce Pfund as the Court's expert ("Pfund" or "Court's Expert"). The Court also ordered that 30% of Mr. Pfund's fees be paid by Plaintiffs and 70% by Defendants. In addition, at that time the Court continued the pre-trial and trial dates for the case to March 11, 2002 and April 9, 2002, respectively.

8. On January 28, 2002, the Court granted Defendants' *ex parte* application and ordered that "the Notice of Intent to Arrest the Vessel Formerly Known as the 'Athena Alexander' . . . be served on all parties at least 15 days prior to Plaintiffs' taking any action toward arrest, and that the Notice state in detail Plaintiffs' demands in lieu of arrest." (Order Requiring Notice of Intent to Arrest at 2:9-13.)

9. Also on January 28, 2002, Plaintiffs and Plaintiffs' counsel Richard A. Caillouette, filed a Notice of Disassociation of Counsel with respect to Plaintiffs' counsel Russell, Mirkovich & Morrow.

10. On February 7, 2002, Plaintiffs filed a "Notice of Release/Substitution of Attorneys and Notice to all Parties that A Plaintiff will Continue as Pro Se." After conducting independent research on the issue of whether Plaintiffs, which include a trust, could appear *pro se* in this matter, the Court issued an order relieving the office of Mr. Caillouette as attorneys for Plaintiffs and indicating that Plaintiffs could appear *pro se*.

11. On February 11, 2002, Defendants filed an *ex parte* application requesting that the Court reconsider its order relieving Plaintiffs' counsel on the ground that non-attorneys may not appear in federal court as representatives of a trust. The Court permitted the parties to further brief this issue. While the Court was waiting for the briefing on the issue of whether Plaintiffs could represent the trust *pro se*, Plaintiffs filed numerous additional motions.

12. On February 12, 2002, the Magistrate Judge assigned to this case denied Plaintiffs' *ex parte* application for order to issue warrant of Maritime Arrest of Vessel on the ground that Plaintiffs had not complied with this Court's January 28, 2002 Order requiring that notice be served at least 15 days prior

to taking any action toward arrest of the vessel at issue.

13. On February 14, 2002, this Court struck the second *ex parte* application filed by Plaintiffs for order to issue warrant of Maritime Arrest of Vessel for failure to comply with *ex parte* procedures. The Court also advised Plaintiffs regarding resources which they should consult to familiarize themselves with this Court's *ex parte* procedures.

14. On February 15, 2002, Plaintiff Nicholas J. Benetic sent a letter to the Court *via fax*. The Court admonished Plaintiffs for sending correspondence to the Court in violation of Local Rule 83-2.11. The Court again directed Plaintiffs to resources which are available to assist *pro se* parties in their litigation before federal district courts.

15. On February 22, 2002, Plaintiffs filed a motion for reconsideration of the Court's February 14, 2002 order striking Plaintiffs' *ex parte* application for order to issue warrant of Maritime Arrest of Vessel. On March 15, 2002, Plaintiffs filed yet another *ex parte* application for an order to issue warrant of Maritime Arrest of Vessel. These *ex parte* applications could not be addressed while the Court was receiving briefing and determining whether Plaintiffs could appear *pro se* in this matter.

16. On March 18, 2002, after reviewing briefing submitted by the parties on whether Plaintiffs could appear *pro se*, and conducting extensive independent research, the Court determined that the Benetics could represent the trust *pro se* because they were the sole beneficial owners of the Benetic Family Trust. The Court also set a briefing schedule on Plaintiffs' two outstanding *ex parte* applications.

17. On March 25, 2002, the Court denied Plaintiffs' *ex parte* applications for failure to comply with the

Court's January 28, 2002 Order, which required Plaintiffs to serve all parties with notice of intent to arrest 15 days prior to taking action toward arrest.

18. On April 3, 2002, Plaintiffs filed yet another *ex parte* application requesting that the Court reconsider its March 25, 2002 denials of Plaintiffs' prior *ex parte* applications. The Court struck this application as Plaintiffs failed, yet again, to comply with the Court's rules, of which Plaintiffs had been advised numerous times.

19. On April 24, 2002, Plaintiffs filed (1) a Notice to the Court of Plaintiff's Communication with the Courts' Expert, (sic) (2) a Designation of Experts at Trial, (3) a Motion & Application for Order to Appoint Substitute Custodian, (4) a Motion to the Court & Application for Order to Issue Warrant of Maritime Arrest of Vessel Named In Rem and (5) a Request for Review in Accordance with Supplemental Rule C. Also, on April 24, 2002, Defendants filed a Request for Status Conference re: Case Administration.

20. On April 26, 2002, the Court issued a minute order addressing these April 24, 2002 filings. In this minute order, due to the disturbing inability of the parties to professionally manage their case, the Court ordered that the parties could only communicate with each other via certified mail and forbade each party from communicating with the Court's Expert. The Court also informed the parties that it would not micro-manage the case to the extent that it was requested to enter into the dispute over payment owed to the Court's expert.

21. On May 3, 2002 Defendants lodged a copy of a letter from Mr. Pfund's counsel indicating that Mr. Pfund had not been paid 30% of his outstanding statement for services rendered, which amount was to be paid by the Plaintiffs. Noting that the failure to pay the

Court's Expert would affect the ability of this case to proceed, the Court issued a minute order on May 6, 2002, ordering the parties to submit documentation showing that they had paid the percentage of Mr. Pfund's fees ordered by the Court in its September 7, 2001 Order and warning the parties that failure to pay the Court's Expert as ordered could result in a stay of the case.

22. On May 10, 2002, Defendants submitted evidence of payment to Mr. Pfund. The Court found that the documents submitted by Defendants showed that Defendants properly complied with the Court's September 7, 2001 Order by paying Mr. Pfund 70% of his fee. Plaintiffs, however, failed to comply with the Court's Order.

23. As a result of Plaintiffs' failure to comply with the Court's September 7, 2001 Order, on May 20, 2002 the Court stayed the case until June 17, 2002 and ordered Plaintiffs to file proof of payment by no later than June 20, 2002. In the Court's Order staying the case, the Court set a pre-trial date of July 8, 2002 and a trial date of July 23, 2002. Also on May 20, 2002, the Court issued an order denying Plaintiffs' Motion to the Court & Application for Order to Issue Warrant of Maritime Arrest of Vessel Named In Rem.

24. On May 31, 2002, Plaintiffs filed a Notice of Appeal to the Ninth Circuit of the Court's May 20, 2002 orders. Plaintiffs filed a second Notice of Appeal of the orders on June 19, 2002.

25. Due to Plaintiffs' appeals, on June 26, 2002, the Court vacated the scheduled trial and pre-trial dates pending resolution of the appeals.

26. Despite the stay effected by Plaintiffs' appeals, on June 28, 2002, Plaintiffs lodged "Evidence Withheld from the Court by the Defense as Evidence of Fraud

by the Defense." Having no jurisdiction over the case during Plaintiffs' appeals, on July 1, 2002 the Court issued a minute order rejecting the filing pending the resolution of those appeals. Also on July 1, 2002, Defendants filed a motion for dismissal, which the Court struck on July 2, 2002 as improper.

27. On July 29, 2002, the Ninth Circuit issued an order indicating that it lacked jurisdiction over the Plaintiffs' interlocutory appeals.

28. On October 1, 2002, the Court reset the final pretrial conference for November 18, 2002.

29. Learning that Plaintiffs had not complied with the Court's May 20, 2002 Order relating to the Court's expert, on October 3, 2002 the Court issued an order to show cause why the case should not be dismissed for Plaintiffs' failure to comply with that order, to which Plaintiffs responded on October 15, 2002.

30. The Court construed Plaintiffs' response as a motion for recusal. The motion was referred to Judge Terry J. Hatter for determination on October 21, 2002. On October 23, 2002, Judge Hatter denied Plaintiffs' motion to recuse.

31. On October 25, 2002, the Court discharged its order to show cause why the case should not be dismissed for Plaintiffs' failure to comply with the May 20, 2002 Order.

32. On November 4, 2002, the Court again reset the pretrial and trial dates in this case for March 3, 2003 and March 18, 2003, respectively.

33. On February 3, 2003, Plaintiffs filed a Notice of Association of Co-Trustee Joseph Benetic as Named Plaintiff In Pro Se. Defendants lodged objections to Plaintiffs' notice on February 7, 2003. On February 12, 2003, the Court ordered Plaintiffs to file a copy of the amended trust agreement by no later than

February 19, 2003. In compliance with the Court's order, Plaintiffs filed an amendment to the Benetic Family Trust, dated as of January 24, 2003, together with a response to the Court's order.

34. The Court being unable to determine from the amendment to the trust document whether Plaintiffs were entitled to continue to appear *pro se*, on February 20, 2003, the Court ordered Plaintiffs to produce documentary evidence by no later than March 7, 2003 demonstrating that they were the sole beneficial owners of the Trust. The Court was therefore required to vacate the scheduled pre-trial conference and conference dates.

35. On March 20, 2003, the Court issued an order indicating that Joseph Benetic could not represent the Trust *pro se*.

36. On March 26, 2003, the Court issued an order striking Plaintiffs' demand that the Court answer Plaintiffs' questions to the Court and motion for sanctions, finding that the former was manifestly improper and the latter entirely meritless.

37. On April 2, 2003, the Court denied Plaintiffs' motion for reconsideration of the Court's order denying Plaintiffs' motion for reconsideration of maritime arrest.

38. On May 14, 2003, Plaintiffs filed a second motion to disqualify or recuse, which Judge Hatter denied on May 19, 2003. Based on the recusal motion, the Court vacated the May 19, 2002 pre-trial conference date.

39. On May 20, 2003, the Court reset the pre-trial conference for June 2, 2003.

40. On May 22, 2003, Plaintiffs filed a motion to disqualify this Court and Judge Hatter, which was denied by Judge Florence-Marie Cooper on May 29,

2003. Also on May 29, 2003, the Court denied Plaintiffs' motion for default judgment against Vessel FKA "Athena Alexander" now known as the "Dioria Ling" and Plaintiffs' motion for reconsideration, granted Defendants' request for sanctions and Defendant Bayport Yachts' motion to quash and ordered Plaintiffs to pay sanctions of $390.00 within 30 days of the Court's order.

41. On June 2, 2003, the parties' pre-trial conference took place, at which the Court issued an order granting Defendants' motion *in limine* to exclude videotape pending Plaintiffs' compliance with Magistrate Judge Eick's 5/14/02 order; denying Defendants' motions *in limine* (1) to exclude charge and plea to speeding, (2) to deny Plaintiffs' claim for consequential damages, (3) to deny Plaintiffs' claim for punitive damages, (4) to deny Plaintiffs' claim for attorneys' fees; and granting and part and denying in part Defendants' motions *in limine* (1) to exclude all recordings of telephone calls and meetings of counsel and (2) to exclude opinions of Mr. Hugo W. Carver II. In addition, the Court found that Defendants' motion *in limine* to exclude evidence of marine surveys not previously produced was moot.

42. On June 9, 2003, finding that it was unnecessary to hold the scheduled final pre-trial conference, the Court vacated the parties' final pre-trial conference date.

43. On June 10, 2003, before trial commenced, the Court issued an order denying Plaintiffs' motions *in limine* (1) to exclude the bond issued by the Kats defendants and (2) to exclude Defendants' counsel.

II. STIPULATED FACTS[3]

1. The Athena Alexander, a pleasure motor yacht, was owned by Defendants Alex Kats and Valerie Kats.

2. The Buenos Aires, a pleasure sailing yacht, was the property of the Benetic Family Trust.

3. Mr. Bizoumis piloted the Athena Alexander, with his wife and two (2) minor children on board.

4. Just after maneuvering out of the slip, Mr. Bizoumis lost control of the Athena Alexander when one of its twin engines malfunctioned.

5. The Athena Alexander contacted the Buenos Aires, which was moored – approximately seven (7) slips from where the Athena Alexander was moored.

6. In addition, Defendants admitted liability for the allision on the record on many occasions.[4]

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[3] The following are facts that Defendants admitted and Plaintiffs did not dispute. Unless otherwise indicated, the events recited herein occurred on June 27, 1999.

[4] The testimony of Patrick Dixon and Werner Kindor corroborated the admissions of liability. Mr. Dixon testified that while he was getting out of his car in the parking lot, he heard an engine roar and saw Defendants' boat pull out of its slip. Mr. Dixon identified Defendants' boat by its brand name, "Carver." Mr. Dixon then heard a "bang" or "clang" and thought Defendants' boat must have hit something, but could not see what it hit. Mr. Dixon did see Defendants' boat leave and then return later, accompanied by the Baywatch Cabrillo, a Los Angeles County lifeguard boat. He described the damage by noting that the pulpit of Defendants' boat was "bent and mangled."

Mr. Kindor also testified that he heard a bang while he was taking a brief pause from varnishing his own boat. Mr. Kindor saw Defendants' boat bounce off Plaintiffs' boat and continue on its way. Mr. Kindor described the damage by noting that the rail on Defendants' boat was bent out of shape.

III. PLAINTIFFS ARE NOT ENTITLED TO PUNITIVE DAMAGES AS A MATTER OF LAW

A. Background

7. At the close of Plaintiffs' case,[5] Defendant Dimitri Bizoumis moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a) as to the issue of whether punitive damages could be assessed against Mr. Bizoumis.

8. The Court did not rule on the motion when it was brought because it wished to complete testimony of Mr. Bizoumis's two witnesses, who were not local, and because Mr. Benetic indicated he had not seen Mr. Bizoumis's Rule 50 motion.

9. Mr. Bizoumis's brief indicated he had unsuccessfully tried to fax the brief to Mr. Benetic several times. Both the Court and defense counsel had continuing difficulties reaching Mr. Benetic by fax in the months leading up to trial. Nevertheless, the Court provided Mr. Benetic an opportunity to read the brief overnight.

10. After hearing oral argument on the motion from both sides, the Court granted Defendant Dimitri

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[5] After the Court ruled that Mr. Kats was unavailable, Plaintiff Nicholas Benetic asked to recall Mr. Bizoumis on the issue of his state of mind because Mr. Benetic could no longer call Mr. Kats. The Court denied the motion at first, noting that Mr. Kats's testimony could in no way have substituted for Mr. Bizoumis's own testimony as to his own state of mind, and that Plaintiffs had already called Mr. Bizoumis and elected to rest upon his deposition testimony as direct testimony. However, after reconsidering Plaintiffs' *pro se* status, the Court ruled on June 11, 2003 that Plaintiffs could recall Mr. Bizoumis. The testimony was to be limited to Mr. Bizoumis's state of mind. However, over the objections of Defendants, the Court allowed Plaintiffs to conduct wide-ranging testimony concerning the allision.

Bizoumis's motion on June 12, 2003 before closing arguments and dismissed Plaintiffs' claim for punitive damages.

B. Findings of Fact Relevant to Mr. Bizoumis's State of Mind at the Time of the Allison

11. The Court had an opportunity to judge Mr. Bizoumis's credibility on both days he was called, particularly when he was recalled on June 11, 2003. The Court found his testimony credible and undisputed on key points.[6]

12. Although Mr. Bizoumis did not own the Athena Alexander, he clearly had permission from Mr. Kats to take the boat out with his wife and children on June 27, 1999, the date of the allision.

13. Mr. Bizoumis had his own keys to the boat and his own parking spot at the marina.

14. Mr. Bizoumis had the benefit of three to seven training sessions at both the Newport and Cabrillo marinas before he took the boat out.

15. The training sessions were with a salesperson from Bayport Yachts, and one or two other people from Bayport Yachts, the company that sold Mr. Kats the Athena Alexander. (Bizoumis Dep. at 28:23-29:11, 30:17-21.)

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[6] Plaintiffs also called Leah Kats Bizoumis, Mr. Bizoumis's wife. Her testimony was consistent with that of her husband.

16. One training session took place in Newport Beach, lasted several hours and involved reviewing the boat's instruments, navigation, maneuvering, starting the boat, getting it out of the slip, cruising, turning, bringing the boat back and docking it in the slip. (Bizoumis Dep. 30:13-15, 30:23-25, 31:12-15, 32:7-13.)

17. Mr. Bizoumis's training also included extensive instruction lasting a full day, from morning well into the afternoon on June 26, 1999, the day before the accident. During the session, the trainers repeatedly reviewed with Mr. Bizoumis how to start the engines, prepare the boat to take out and back it out. (Bizoumis Dep. at 48:2-5, 48:15-17, 49:6-14.) At trial Mr. Bizoumis testified they had practiced taking the boat out a dozen times.

18. On June 27, 1999, due to his training, Mr. Bizoumis believed that he was capable of safely operating the Athena Alexander.[8]

19. Mr. Bizoumis was aware that the Athena Alexander had experienced prior engine failures. However, Mr. Kats told him the day of the allision that Bayport Yachts had assured him the engine problems had been resolved and the boat was safe to take out.[9]

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[8] The Court discounts the testimony of Mr. Gordian that Mr. Bizoumis had no idea of the boat's systems, operating procedures or emergency procedures. Mr. Gordian admitted he did not know whether Mr. Bizoumis was receiving training from anyone else. In particular, Mr. Gordian admitted he was unaware of the significant training and practice Mr. Bizoumis had received the day before the accident.

[9] The Court admitted this statement because of its relevance to Mr. Bizoumis's state of mind.

Accordingly, on June 27, 1999, Mr. Bizoumis believed that the Athena Alexander was in proper working order.

20. After Mr. Bizoumis backed the boat out, turned, straightened and headed down the channel, the starboard engine failed. The boat then moved to the right, at which time Mr. Bizoumis felt the boat bump against something and bounce back slightly.

21. At the time, Mr. Bizoumis thought he had struck a piling.[10] In fact, he had struck Plaintiffs' boat.

22. Mr. Bizoumis testified that he did not see Plaintiffs' boat at the time of the allision, and that he did not intend to allide with the Buenos Aires. His testimony is undisputed.

23. Mr. Bizoumis testified that had he known he had struck Plaintiffs' boat, he would have stopped, if he could have. However, he was not aware he had struck the boat or caused any damage.

24. Due to the engine failure, the boat began to move to the left. Mr. Bizoumis turned his attention to getting the boat out into the open, eventually reached the channel, told his wife to call vessel assist and was rescued.

25. Mr. Bizoumis was not under the influence of alcohol or drugs that day.

26. When the Athena Alexander was brought back into the marina, no one told Mr. Bizoumis that he had struck another vessel. In fact, one of the individuals from Bay Watch checked around the marina and

[10] Mr. Bizoumis's testimony was consistent throughout on this point. (Bizoumis Dep. 79:8-14, 80:4-5, 83:10-11, 89:19-20.)

told him he was lucky he had not hit anything. Mr. Bizoumis trusted this information until he heard from Mr. Kats that the Athena Alexander had struck another vessel. (Bizoumis Dep. at 106:10-107:24.)

27. Plaintiffs did not present any evidence that would suggest that Mr. Bizoumis acted with an intent to harm when he took out the Athena Alexander.

C. Legal Standard

28. Rule 50(a) provides, in pertinent part, that if:

> there is no legally sufficient evidentiary basis for a reasonable jury to find for [a] party on [an] issue, the court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a) (1).

29. A motion for judgment as a matter of law "may be made at any time before submission of the case to the jury." Fed. R. Civ. P. 50(a) (2). "Nothing in Rule 50 . . . requires that a motion for a directed verdict come at a specific time in the case." *American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135, 139 (6th Cir. 1995) (rejecting position that "a motion for directed verdict can only be properly raised and granted (1) after the opening statement of an adverse counsel, if by such statement it is clear that no question for the jury exists; (2) at the close of the evidence offered by an opponent; (3) or at the close of all evidence.").

30. In ruling on a Rule 50 motion, a court must review the evidence " 'in the light most favorable to the nonmoving party and draw all possible inferences in favor of that party.' " *Ellison v. Shell Oil Co.*, 882 F.2d 349, 352 (9th Cir. 1989) (citing *Donoghue v. County of Orange,* 848 F.2d 926, 932 (9th Cir. 1987). "A directed verdict may be upheld only when the evidence permits but one reasonable conclusion as to the verdict." *Id.* In other words, the Court must determine "whether or not, viewing the evidence as a whole, 'there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party.' " *Quichocho v. Kelvinator Corp.*, 546 F.2d 812, 813 (9th Cir. 1976) (quoting *Chisholm Bros. Farm Equipment Co. v. Int'l Harvester Co.,* 498 F.2d 1137, 1140 (9th Cir.), *cert. denied,* 419 U.S. 1023 (1974)). *See also Berry v. Bunnell,* 39 F.3d 1056, 1057 (9th Cir. 1994) ("A directed verdict is proper when the evidence permits only one reasonable conclusion."); *McGonigle v. Combs,* 968 F.2d 810, 816 (9th Cir.), *cert. dismissed,* 506 U.S. 948 (1992) (citing same principle).

D. Discussion

31. Plaintiffs request that punitive damages be awarded on the grounds that Mr. Bizoumis acted with recklessness and callous disregard for others when he took the boat out on June 27, 1999.

32. The Court agrees with Defendants that there is no basis for an award of punitive damages.

33. Generally, punitive damages may be awarded in maritime tort actions where a defendant's actions are intentional, deliberate or so wanton and reckless as to demonstrate a conscious disregard of the rights of others. *See Protectus Alpha Navigation Co. v.*

North Pacific Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985) (citations omitted); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972), *cert. denied*, 409 U.S. 982 (1972). "A condition precedent to awarding [punitive damages] is a showing by the plaintiffs that the defendant was guilty of gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct." *See Marine Sulphur Queen*, 460 F.2d at 105.

34. The purpose served for awarding exemplary damages is to punish the defendant and to deter others from acting in like manner. *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101, 104 (1893). Punitive damages are solely intended to serve the purposes of punishment and deterrence, and should not provide plaintiff with a windfall. *Aldrich v. Thomson McKinnon Sec., Inc.*, 756 F.2d 243, 249 (2d Cir. 1985).

35. As Defendants admit liability, the Court assumes that Defendant Bizoumis admits negligence.

36. Although Mr. Bizoumis admits liability for the accident, his actions do not reflect a state of mind that calls for an award of punitive damages. His actions do not reflect anything like recklessness, callous disregard for the rights of others, gross negligence, actual malice or criminal indifference.

37. Even if the Court were to credit the testimony of Plaintiffs' witnesses Mr. Dixon and Mr. Gordian, Plaintiffs would not establish that Mr. Bizoumis acted with the state of mind required for punitive damages.

38. If true, the testimony of Messrs. Dixon and Gordian merely suggests that Mr. Bizoumis acted negligently, not that he acted recklessly, with malice or

with callous disregard for the rights of anyone. Although it may be unwise to gun the engines or travel fast enough to create a wake in a marina, such behavior alone does not constitute recklessness.

39. Indeed, there is no credible or substantial evidence to support a finding that Mr. Bizoumis had any "evil motive" or other such punishable state of mind at or near the time of the allision.

40. Plaintiffs thus failed to establish a prima facie case on the issue of punitive damages.

41. Accordingly, the Court granted Defendants' motion and denied an award of punitive damages as a matter of law.

IV. FINDINGS OF FACT

A. Damage to Buenos Aires

42. All the experts who testified on the extent of damages, whether called by Plaintiffs (Thomas W. Bell and William Engstrom) or by Defendants (Bruce Pfund and Todd Schwede), were fairly consistent as to the areas in which the Buenos Aires suffered damage and, equally importantly, as to the areas of the Buenos Aires that were not damaged.

43. Some experts examined the Buenos Aires closer in time to the allision; others examined it years later:

    a. Plaintiffs' expert Mr. Bell examined the Buenos Aires in July of 1999. (Bell Testimony, Ex. 209.)

    b. However, Plaintiffs' expert Mr. Engstrom did not perform his survey until May 29, 2001. (Ex. 212.)

c. Defendants' expert Mr. Schwede surveyed the Buenos Aires on July 7, 1999. (Schwede Testimony, Ex. 215.)

d. Defendants' expert Mr. Pfund surveyed the vessel on January 7-8, 2002. (Pfund Testimony, Ex. 214.)

44. The allision between the Athena Alexander and the Buenos Aires resulted in the Buenos Aires suffering a bent bow pulpit,[11] bent lifeline stanchions, bent dolphin striker rod, damage to the roller furling headstay and halyard and minor damage to attachment points.

45. The allision damage to the Buenos Aires did not render the vessel a total loss.

46. The Buenos Aires suffered no allision damage to its structure or major components, including the vessel's hull (Schwede and Engstrom Testimony), keel (Pfund Testimony), interior (Pfund and Engstrom Testimony), engines (Engstrom Testimony), machinery (Engstrom Testimony) and rigging (Engstrom Testimony, Engstrom Dep. at 35:2-12).

47. With regard to the individual surveyors who testified, the Court gave the greatest weight to expert Mr. Schwede of Todd and Associates.

48. Mr. Schwede is a qualified expert on the subject of marine surveys, forensic damage evaluation, vessel repair and cost of vessel repair.

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[11] The pulpit is a stainless steel framework around the bow of the boat. The pulpit acts as a safety device. It provides a structure to hang onto, sit on, etc. when tending the sails. It attaches to the bow plank of the boat, which is a flat piece of wood mounted on an aluminum frame structure that is bolted to the framework. (Schwede Testimony.)

49. Mr. Schwede has been an accredited marine surveyor since 1984, holding a membership in the Society of Accredited Marine Surveyors. He currently serves on the Board of Directors of the International Association of Marine Investigators. He has been a boat builder since the 1980's and has also worked for the Lloyd's of London surveyor A.N. Tillett & Associates in San Diego, California. Mr. Schwede was invited to become a partner at Eichenlaub Marine and helped convert that boatyard's business from new construction to repair and modification of boats.

50. Mr. Schwede has published articles on stolen boat investigations in *Boating Magazine* and *Hot Boat Magazine*; and has had two technical articles published in *Technical Exchange for Marine Professionals*.

51. Mr. Schwede is also a certified instructor with the International Association of Marine Investigators, and has taught classes in marine forensic photography, accident damage investigation, accident reconstruction and insurance fraud. He is currently an instructor with the American Boat and Yacht Council, teaching a course in marine accident investigation and accident reconstruction.

52. Mr. Schwede performs 350 inspections a year, 70% of which are for insurance company clients. The rest are for banks, the Internal Revenue Service, the Coast Guard, the Navy and the public.

53. Although Mr. Schwede was hired by Markel American Insurance Company, Defendants' insurance company, to determine the damage to the Buenos Aires from the allision and therefore could have been biased in favor of the insured, the Court

weighed this factor and found his testimony to be entirely credible.[12]

54. With Mr. Benetic present, Mr. Schwede surveyed the Buenos Aires while it was dry-docked and visually inspected the bow pulpit, lifelines, deck, chain locker, bulwarks and all deck areas in the forward area. He also searched for stress in the laminated and bolted structures.

55. In addition, Mr. Schwede climbed on a ladder up to the deck levels, performed a visual inspection and felt the surface of the hull for stress fractures.

56. In Mr. Schwede's opinion, the only impact was pulpit to pulpit, evidenced by metal to metal scratches on the pulpits and the direction of the bends of the pulpit.

57. Mr. Schwede did not believe there had been any physical impact on the fiberglass hull portion of the boat and observed only minor damage to the recessed pockets in the bulwarks, and some minor movement (i.e., 3/16ths of an inch) in the bow plank.

58. In Mr. Schwede's opinion, there was no significant damage to the hull.

59. Mr. Schwede saw no scratches, dents, deflections or disruptions to the fiberglass, gelcoat or bottom paint that would suggest the bow had suffered a blow. Mr. Schwede did not notice any other physical indicators that showed trauma to the bow.

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[12] Mr. Schwede's credibility was enhanced by his undisputed testimony that he asked Mr. Benetic to point out any damages that he might have overlooked. When Mr. Benetic indicated he believed there were stress fractures to the lifeline stanchions, Mr. Schwede added that item to his recommendations for repair. Mr. Schwede stated "If I couldn't rule [a repair request] out, I'd include it."

60. At every location Mr. Schwede inspected, Mr. Schwede asked Mr. Benetic what damages he knew about.

61. In his survey, Mr. Schwede listed the following recommendations for repair:

    a. "Remove and replace double course stainless-steel bow and stern pulpits as per original." (Ex. 215 at 1.)

    b. "Replace vinyl covered stainless steel lifelines and associated hardware, and replace four bent lifeline stanchions. Provide gel coat and fairing to all lifeline stanchion plugs at bases, where disrupted, located in bulwarks, and blend gel coat to match. Provide compound and wax to the hull of the vessel as per original." (Ex. 215 at 1.)

    c. "Remove and replace bow plank frame and bow plank, remove teak plank, repaint frame, remove corrosion located at mounting hardware and treat with epoxy. Re-coat with linear polyurethane, replace teak plank and reinstall, as per original." (Ex. 215 at 1.)

    d. "Provide gel coat repairs to inside bulwark area where bow plank attaches to bulwark. Blend to match existing gel coat, re-bed and secure covers over bolts." (Ex. 215 at 1.)

    e. "Provide gel coat touch-up to bulwark area located beneath bow plank. Remove and re-bed stem fitting, blend gel coat to match as per original." (Ex. 215 at 1.)

    f. "Provide aloft rigging inspection by [a] qualified rigging co[mpany], to mast, standing and running rigging, and provide written report of findings." (Ex. 215 at 2.)

g. "Remove and replace with new, bow plank dolphin a [sic] striker rod as per original." (Ex. 215 at 2.)

62. The Court found Mr. Schwede's inspection to be thorough and unbiased, especially as his unrefuted testimony indicates he gave the Plaintiffs every opportunity to bring additional damage to his attention.

63. Accordingly, the Court adopts Mr. Schwede's finding that the point of impact was pulpit to pulpit; i.e., the stainless steel pulpit of the Athena Alexander collided with the pulpit of the Buenos Aires.

64. The Court found Mr. Pfund[13] to be highly qualified and credible,[14] but limited in his area of expertise to

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[13] Mr. Pfund was originally selected as the Court's own expert in this matter. However, the Plaintiffs repeatedly accused Mr. Pfund of being prejudiced in favor of the defense. There also were serious disagreements concerning payments due Mr. Pfund. Accordingly, the Court found it necessary to relieve Mr. Pfund as its expert to avoid further unpleasantness for him and alleviate a contentious issue which threatened to derail the progress of the case. Thereafter, the defense designated him as one of its experts.

[14] Mr. Pfund is an expert in the manufacture and construction of composites for the marine industry. He has had hands-on experience with marine composites since he worked in a small boatyard as a teenager. Throughout his career, he has had wide exposure to many materials and processes used in connection with civilian, commercial, recreational and military boats, ships and yachts. He has consulted for boat manufacturers, material vendors, material distributors, naval architects, marine engineers, individual owners, insurance companies, the United States Navy and the Royal Australian Navy. He has been involved with both the construction and repair of boats. In the 1990's, Mr. Pfund manufactured process machinery used in the manufacture of boats and provided application consulting on that kind of equipment to boat manufacturers. He has developed and patented non-destructive inspection equipment for composites.

(Continued on following page)

the inspection of the vessel's composite construction and mechanical attachments thereto.

65. Mr. Pfund did not inspect the Buenos Aires until January of 2002.[15]

Mr. Pfund has also served as technical editor of *Professional Boat Builder Magazine* since its inception in 1989 and has published over one hundred articles in the consumer and trade marine press. He has taught classes on the manufacturing and inspection of composites in the marine industry for the United States Navy, the American Bureau of Shipping, the Wooden Boat School and a variety of trade schools. The inspection of damages and damage repair forms a significant part of his vessel inspection work.

[15] Plaintiffs attempted to introduce a videotape of the survey conducted by Mr. Pfund on January 7-8, 2002. The Defendants filed a Motion *in Limine* to Exclude Videotape on February 7, 2003. The Court found in favor of Defendants and excluded the videotape until Plaintiffs complied with Magistrate Judge Eick's May 14, 2002 order that "[w]ithin ten (10) days of the date of this order, Plaintiffs shall make available to Defendants for inspection and copying the videotape recording of the survey." (6/2/03 Order at 5.) The Court reinforced Magistrate Judge Eick's order in its own order dated June 2, 2003, stating "[t]he onus is therefore on Plaintiffs to arrange for inspection and copying of the videotape," although the Court indicated that Defendants were to pay the cost of copying. *Id.* It is undisputed that the Plaintiffs did not allow Defendants to inspect and copy the original videotape. In fact, Mr. Benetic stated that the original 8mm tape was in Florida.

In an unusually contentious exchange, even within the parameters of this contentious case, Plaintiffs at first refused to supply the Defendants with the videotape. *See* Decl. of Non-Compliance ¶ 4, Ex. A (in which Joseph Benetic, Mr. Benetic's son, states in a fax to Donald Sands of Sands and Lerner, "I will need sufficient funds in advance and at least 1 week advance notice to make a copy," and also states, "I refuse to provide to you criminals, my address as you have physically harmed and threatened me for no reason, in the past." In the same fax, Joseph Benetic also refused to make a copy of the tape without a copy of the Court's order.) Despite Plaintiffs' refusal to provide Defendants with the original tape, Plaintiffs did provide defense counsel with a VHS format copy labeled "Defense Copy." However, defense counsel noticed immediately that the videotape was not in the original 8mm

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66. Mr. Pfund conducted a visual inspection and "hammer sounding" of the boat. Disassembly was not permitted, but this did not inhibit the inspection, according to Mr. Pfund.

67. Upon inspecting the exterior, Mr. Pfund saw no evidence of impact in the form of gouges, scrape marks, rubber or paint transfer.

68. Mr. Pfund inspected each lifeline stanchion and its attachment to the rail of the bow spirit. He noted that the stanchion assemblies were bent to starboard and concluded that the impact occurred there.

69. Mr. Pfund agreed with Mr. Schwede that the point of impact was the tubular metal and wire structure (i.e. the bow pulpit attachments), not the hull itself.

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format. (*Id.* ¶ 9.) Defense counsel viewed the videotape and found it "shockingly worthless." (*Id.* ¶ 1.)

On the first afternoon of trial, the Court and all counsel attempted to watch Plaintiffs' copy and the copy provided to defense counsel. Neither copy was viewable. The Court retained both copies overnight. All parties convened again at 8:30 a.m. the next morning to view the videotapes with the assistance of the Court's technical personnel. At that time, the Plaintiffs' copy was more than adequate for viewing. However, the defense's copy of the tape, as the record will show, was unwatchable in terms of picture and sound quality. Plaintiffs claimed that Defendants tampered with the video sent to them. The defense counsel denied any tampering, and referred to their previously filed Declaration of Non-Compliance.

Pending Plaintiffs' compliance with Magistrate Judge Eick's order, the Court excluded the videotape in its June 2, 2003 order. (6/2/03 Order at 14.) Plaintiffs failed to comply with the Order. Therefore, the Court excluded the videotape.

Although exhibits are typically returned to counsel at the conclusion of Central District civil trials, the Court has ordered that both copies of this videotape be retained by the clerk's office pending appellate review.

70. Mr. Pfund found, and the Court adopts as its finding, that there was minor composite damage in bow pulpit attachment locations consistent with allision impact. (Pfund Testimony, ex. 214 at 12.)

71. Mr. Pfund also inspected the cleats, chocks and hose pipes. He observed no damage except to the lifeline stanchion and tubing system.

72. Mr. Pfund inspected the interior and found no indication of damage consistent with a significant impact to the bow of the boat.

73. While inspecting the interior, Mr. Pfund looked into as many compartments as possible where the hull attached to the liner and saw no cracking or other indications of any significant impact to the boat.

74. Mr. Pfund also inspected the wooden fixtures, trim, joiner work, door openings and mitre joints because damage to any of these often indicates hull movement. However, he found no indication of failure or cracked varnish and concluded that minimal impact loads were involved in the allision.

75. In sum, Mr. Pfund was of the opinion that the damage from the allision was limited to the bow pulpit attachments and the lifeline stanchions aft of the bow pulpit.

76. Like several of the other experts, Mr. Pfund observed other damage unrelated to the allision. For example, he noted osmotic blistering under the hull caused by long term immersion, but saw no scrape or gouge marks beneath the water line. In Mr. Pfund's view, keel damage was unrelated to the allision.

77. Mr. Pfund also testified he saw evidence of prior repairs at the pointed, uppermost part of the bow,

revealed by coatings of slightly different color and texture than the surrounding areas.

78. The Court found Mr. Pfund's testimony to be consistent with Mr. Schwede's testimony.

79. Mr. Thomas W. Bell also testified as to the amount of damage to the vessel.

80. Mr. Bell has been a surveyor for over 40 years, having surveyed over 5,000 vessels, from tankers to small vessels. Typically, he determines whether a vessel is insurable.

81. Mr. Bell testified to the presence of numerous minor stress fractures in the bow spirit area where the bow spirit tubular was affixed to the hull.

82. Mr. Bell was of the opinion that there did not appear to be any significant structural damage to the hull, although he thought the boat would have to be taken apart to be certain.

83. In his survey, Mr. Bell recommended the removal of the bow spirit tubular steel frame to effectuate repair of minor stress fractures in the hull's finish. (Ex. 209.)

84. Mr. Bell also noted in his survey that the upper railing was severely damaged and the stanchions were pulled and bent, which also affected the lines. In addition, Mr. Bell noted damage to the roller furling.

85. Mr. Bell was of the opinion that the boat was "severely hit," (Bell Testimony, Ex. 209), however the damage described in his brief, two paragraph summary was consistent with the damage noted in the survey by Mr. Schwede, who testified that the force of the allision had been minor.

86. The Court notes that each item of damage appearing in the Bell survey was accounted for in the estimate prepared by Wayne Morrison at Mr. Schwede's request. (Ex. 209 (Bell Survey), Ex. 215 (Schwede Survey.)) In fact, Defendants' expert Mr. Schwede recommended more areas of repair than Plaintiffs' own expert Mr. Bell, although the two surveyors inspected the Buenos Aires within a month of each other. (*Id.*)

87. Mr. William Engstrom also testified as to the condition of the vessel when he inspected it on May 29, 2001, although he was not tasked with determining which damage was caused by the allision. (Engstrom Testimony, Engstrom Dep. 22:13-23:7.)

88. Mr. Engstrom has been a certified marine surveyor for close to ten years. He is a member of the Board of the National Association of Marine Surveyors and has served on standing committees within that organization. (Engstrom Dep. 15:19-16:3.)

89. Mr. Engstrom has managed a repair yard for major manufacturers for 19 years, and thus has experience in all areas of the marine pleasure craft industry. (Engstrom Dep. 16:11-14.)

90. Mr. Engstrom made recommendations consistent with those of the other experts with respect to damage attributable to the allision, having recommended replacement of the bow pulpit, renewal of the roller furling drum, inspection of the masthead by riggers, repair of bent bobstay and repair of fractures near the pulpit. (Ex. 212 at 2-3.)

91. Mr. Engstrom also noted other areas of damage but had no opinion as to whether they were related to the allision. (Engstrom Dep. at 22:13-22.) His other recommendations included termite extermination, replacement

replacement of leaking refer raw water intake valve, cleaning bilge, service of aft head waste discharge valve, service of fire extinguishing system, renewal of emergency flares, renewal of standing rigging, resealing of mast boot and rebedding of portside salon cabin windows. (Ex. 212.)

92. The Court found Mr. Engstrom to be a highly credible and qualified witness. However, the Court adopts as its findings Mr. Schwede's and Mr. Pfund's testimony as to the damage caused by the allision because Mr. Engstrom did not have an opinion about the source of the additional damage he identified, and because the other experts did not mention the additional damage or attribute it to the allision.

93. Based on Mr. Schwede's survey and those of the other experts, the Court finds that the force involved in the allision was minor. With the exception of the Bell survey, there was no contradictory evidence offered by any expert. *See* Ex. 212 (Engstrom Survey, which recommends the replacement of the bent bow pulpit and the renewal of the roller furling drum); Ex. 214 (Pfund Survey at 3, "No gross structural damage to the vessel's composite deck, topsides or internal structure and joinerwork attachments was observed. All composite damage is rated as minor, and easily repairable." *See also* Ex. 214 (Pfund Survey at 12) ("Minor composite damage directly in way of bow pulpit attachment locations was noted, consistent with allision impact as described in case documents.")

94. Accordingly, the Court discounts the Bell survey as to the severity of impact, as that was the only point on which the Bell survey substantially diverged from the other surveys.

95. Mr. Joseph Benetic also testified, but the Court did not find his testimony to be helpful or relevant.

96. The Court finds, consistent with the testimony and surveys submitted by Messrs. Schwede and Pfund, that the force of the subject collision was very limited. To the extent that Plaintiffs' expert Mr. Bell concluded that the vessel was hit "very hard," the Court disagrees.

B. Plaintiff Nicholas Benetic's Testimony

97. Mr. Benetic testified that his company bought the Buenos Aires from the manufacturer in 1999 for $262,000 and transferred it to the Benetic Family Trust, the actual plaintiff in this case.

98. Mr. Benetic then incurred additional expenses and made certain improvements to the vessel.

99. After the allision on June 27, 1999, Mr. Benetic had some repair work done to address underwater damage (Ex. 206), spending $1,225.69 to insure that the boat could remain afloat. Mr. Benetic has maintained the vessel as well as possible. However, Mr. Benetic decided not to repair any structural or cosmetic damage to the Buenos Aires.

100. Mr. Benetic is self-insured.

101. Mr. Benetic testified that he spent between $270,000-$300,000 for surveys, attorneys fees, attending depositions and other items relating to the allision, and that he was forced to sell his office building to pay for the expenses he incurred in this case.

102. Mr. Benetic testified he has suffered economic loss because of his inability to use the Buenos Aires since the allision occurred.[15]

103. Mr. Benetic also testified that he agreed to sell the Buenos Aires to Mr. Krakoff for $272,500. Mr. Krakoff wrote him a personal check for $44,500 dated June 24, 1999. (Ex. 203-5.) After the accident, Mr. Benetic wrote Mr. Krakoff a letter informing him of the accident (Ex. 203-6), and Mr. Krakoff subsequently withdrew his offer in a letter. (Ex. 203-7.) Mr. Benetic then returned Mr. Krakoff's check to him. (Ex. 203-8.)[16]

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[15] The Court notes that Mr. Benetic did not submit any evidence relating to damages for survey costs, attorneys' fees, sale of his building or loss of use of the Buenos Aires. There was no evidence that the Buenos Aires had ever been chartered for hire. Plaintiffs also failed to offer any legal support for the position that Mr. Benetic was entitled to reimbursement for the cost of surveys, for attending depositions or for the sale of his building.

[16] Mr. Benetic identified additional categories of loss in his closing argument, such as four years of lost income from his mortgage company, yacht sales company and development firm because he has been too upset to work. For example, Mr. Benetic referred to $35,000 in expenses from the lawsuit in which Mr. Bizoumis sued him for harassment, sought marina fees of $550 per month for the past four years and asked for attorneys' fees while represented, "recovery of supervision," recovery for lost assets sold to continue litigation, recovery for the depreciation of the vessel, diminution of value of $140,000 and $70 per day in overhead for the last four years. The Court advised Mr. Benetic that closing argument was not testimony. In addition, Mr. Benetic did not submit testimony or exhibits during his case that would support any of these claims. For example, Mr. Benetic did not submit any evidence of lost wages from any of his companies. He submitted no evidence corroborating his claims for the amount of marina fees, depreciation, diminution of value or overhead. The Court finds that Mr. Benetic did not mitigate his losses, with the exception of the initial repairs of $1,225 in July of 1999. The Court finds that these additional categories would not be recoverable under damage principles of

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C. Cost of Repair

104. Plaintiffs introduced only one estimate for the cost of repair, upon which the Court could not rely, as explained below.

105. Defendants produced one repair estimate submitted by Mr. Schwede, upon which the Court relies.

106. Mr. Schwede asked Plaintiffs to provide him with estimates for the repair work, and Plaintiffs referred him to Mr. Bell instead. However, Mr. Bell's survey does not itself provide an estimate of the cost of repairs (Ex. 209), and Mr. Schwede testified that Mr. Bell never provided him with any repair estimates.

107. Indeed, Plaintiffs did not submit any estimates for the cost to repair the Buenos Aires until late in the course of litigation, when Mr. Carver offered an indefinite and speculative "guesstimate."

108. Mr. Schwede decided to obtain a repair bid on his own because his multiple requests to Plaintiffs and Mr. Bell had not produced estimates.

109. In order to "move [the process] forward", Mr. Schwede met with Mr. Wayne Morrison of Shelter Island Boatyard[17] and showed him the survey and photographs.[18]

110. Mr. Morrison did not examine the Buenos Aires before preparing the estimate, but he did use Mr.

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admiralty law. Because the Court finds that these categories of loss, even if correct, are not recoverable, it is unnecessary to discuss them further.

[17] Shelter Island Boatyard is the landlord for Todd and Associates.

[18] Mr. Schwede also asked Newport Harbor Shipyard to prepare an estimate, but the boatyard declined to do so.

Schwede's survey (Ex. 215) and photographs Mr. Schwede took as a basis for his estimate.

111. In the past, boatyards had provided estimates for Mr. Schwede without inspecting the vessels based on Mr. Schwede's written recommendations and photographs.

112. The line-item estimate prepared by Mr. Morrison of Shelter Island Boatyard addresses all the damage to the Buenos Aires caused by the allision.

113. Mr. Carver was Plaintiffs' sole expert on the cost of repair and carefully limited his testimony to this topic. The Court has no doubt that Mr. Carver is well-qualified to repair vessels, as he is a 50% owner of a boatyard with 185 employees that builds new yachts and conducts repairs for the U.S. Navy and Coast Guard, among others. However, Mr. Carver's testimony had many limitations.

114. The estimate prepared by Mr. Carver is an indefinite and speculative global "guesstimate," as opposed to a line-item estimate from which the cost to repair only allision damage can be ascertained.

115. The "guesstimate" made by Mr. Carver includes repair of nonallision damage, and would result in improvements and betterments, to the Buenos Aires beyond the pre-allision condition of the Buenos Aires.

116. Mr. Carver testified that his "guesstimate" as to the cost of repairs was based primarily on an 87-item list of repairs given to him by Mr. Benetic, which he was informed was a compendium of the experts' surveys. Mr. Carver testified that he had no way of knowing whether the items on the list were due to allision damage or not, stating "I don't know which ones are the result of an allision or anything else.

That's not my field of expertise." (Carver Testimony.) Mr. Carver used the list as his "guidepost," i.e., the primary document he relied upon in forming his "guesstimate."

117. Mr. Carver testified that it would cost approximately $5,000 to prepare a true estimate.

118. In his "guesstimate," Mr. Carver included the cost of removing the vessel interior, which he estimated would require 2,000 man hours and cost over $100,000. Mr. Carver decided it would be necessary to remove the interior because it was included on the 87-item list and was mentioned in the Pfund survey. Mr. Carver also testified that he would reduce his "guesstimate" by over $100,000 if it were unnecessary to remove the interior.

119. During his testimony, Mr. Pfund testified that he did not state or imply that disassembly was required, and indeed it is clear from Mr. Pfund's survey that he did not recommend disassembly in order to detect repairs.[19]

120. Once Mr. Carver freely admitted that he would reduce his estimate by "over $100,000" if the interior did not have to be removed, the Court asked if he could provide a breakdown as to the cost of repair of other items to account for the remaining

[19] Disassembly is referred to in what appears to be a standard disclaimer at the end of Mr. Pfund's survey: "This inspection was conducted without any disassembly requiring tools, or any destructive sample removals on the subject vessel. As a result I was unable to fully investigate certain aspects of the vessel's original construction, allision damage and current condition. Accordingly, the opinions rendered in this report are subject to amendment or revision if further information that I did not have at the time this report was prepared becomes available." (Ex. 214 at 13.)

$100,000-$150,000 of his "guesstimate." Mr. Carver stated that he could not provide such a breakdown.

121. The Court found that Mr. Carver was candid in recognizing the limitations of his own testimony and honest as to the shortcomings of his estimate. Nevertheless, the Court was unable to rely on his testimony for the following reasons:

a. Mr. Carver believed the 87-item list provided by the Mr. Benetic to be a compendium of the surveys, although Mr. Carver did not independently evaluate whether the items on the list were attributable to allision damage, pre-existing damage, manufacturing defects or other causes.

b. Mr. Carver mistakenly believed that the Pfund survey required an estimate for the extremely labor intensive job of removing the interior of the vessel, which would consume 2,000 hours of labor.

c. Mr. Carver also stated that it would cost at least $5,000 for him to conduct a proper estimate, whereas he had provided the "guesstimate" to Plaintiffs at no charge and without having seen the vessel.

d. Although Mr. Carver believed his estimate was more reliable than the original "guesstimate" because he had since seen the vessel and reviewed the surveys, Mr. Carver also candidly admitted that he continued to rely on the 87-item list as the basis for his estimate at trial.

e. Lastly, Mr. Carver was unable to break down the remaining $100,000-$150,000 after subtracting the unnecessary cost of removing the interior, or to indicate how the remaining cost correlated with the repairs that were still necessary.

122. Accordingly, the Court finds Mr. Carver's "guesstimate" too imprecise to be relied upon. In the absence of any other reliable estimate, the Court relies upon and adopts the Morrison/Shelter Island estimate for the cost of repair to the Buenos Aires.

D. Lost Profits

123. Plaintiffs sought damages for loss of profits based upon the purported June 24, 1999 pre-allision agreement with Mr. Krakoff to purchase the Buenos Aires for $272,500 and his withdrawal from the purchase agreement after the allision.

124. Mr. Krakoff did not testify at trial; however, the Court admitted his deposition and (1) the purchase order dated June 24, 1999 (Ex. 203); (2) deposit check dated June 24, 1999 in the amount of $44,500 (Ex. 203-5) and (3) subsequent letters between the parties (Ex. 203-6, 203-7 and 203-8). The Court also received into evidence Mr. Krakoff's bank account records from Bank of America. *See* Exhibits 220-225.[20] Mr. Krakoff's testimony was troubling, as he refused to answer many questions, some of which were themselves troubling. It is therefore impossible to judge Mr. Krakoff's credibility on the basis of this record. Plaintiff Nicholas Benetic testified also to the details of the transaction.

125. Assuming the credibility of the documents, Mr. Krakoff had paid $44,500 by check on June 24, 1999 and owed a balance of $228,000. However, according to his own testimony, Mr. Krakoff did not have financing for the balance of the purchase price (Krakoff Dep.

[20] These exhibits were received by stipulation of the parties at the close of oral argument.

at 28:16-25; indicating that Mr. Krakoff was still seeking financing at the time of the allision.)

126. Defendants contend that the purported sale of the vessel to Mr. Krakoff was a sham.

127. Without making any findings as to credibility, the Court finds that the Plaintiffs cannot establish that the sale would have been consummated but for the allision because Plaintiffs failed to prove that the sale could have been consummated. Therefore, the Court declines to award lost profits.

128. Any conclusion of law which is deemed a finding of fact is incorporated by reference herein.

V. CONCLUSIONS OF LAW

A. Jurisdiction

1. This Court has jurisdiction over this admiralty case pursuant to 28 U.S.C. § 1333.

B. Cost of Repair/Diminution in Value

2. "'Restitutio in integrum' is the leading maxim applied by the admiralty courts to ascertain damages resulting from a collision. . . ." *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146, 158 (1925) (citation omitted).

> "[W]here repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision [or allision] occurred. . . . Restitution or compensation is the rule in all cases where repairs are practicable."

The Baltimore, 75 U.S. 377, 385-86 (1868).

> "The proper measure of damages in a tort action 'is to place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred. As corollaries to this general rule, a defendant cannot be held liable for damages that he has not been shown to have caused, or for the cost of repairs that enhance the value of the damaged property compared with its pretort condition.
>
> When a vessel is damaged in a collision or other marine casualty, the amount of recovery depends on whether it is deemed a total (or constructive total) loss or whether its partial damage justifies repair. . . . When a damaged vessel is not a total loss, the owner is entitled to recover the reasonable cost of repairs necessary to restore it to its precasualty condition."

Gaines Towing & Transportation Co. v. Atlantia Tanker Corp., 191 F.3d 633, 635 (5th Cir. 1999) (citations omitted).

3. "[I]n admiralty, the cost of repairs is the equivalent of value-diminution. Damage less than total loss is compensated by reference to cost of repairs." *Hewlett v. Barge Bertie,* 418 F.2d 654, 658 (4th Cir. 1969) (citation omitted).

> "Strictly the measure of damages in collision is the difference in value between the ship before and after the collision, but the cost of the necessary repairs and the loss of earnings while they are being made have long been regarded as its equivalent." *Id.* (citation omitted).

4. Plaintiffs sought damages for diminution in value. However, Plaintiffs presented no evidence that the vessel was a total loss such that an award of diminution of value would be warranted.

5. Indeed, Plaintiffs did not present any evidence of the market value of the vessel before the accident or following completion of repairs.[21]

6. An offer to buy is not evidence of value. *Sharp v. United States,* 191 U.S. 341, 348-49 (1903); *Lowery v. Tug Ellen S. Bouchard,* 166 F.Supp. 491, 492 (N.D.N.Y. 1958) (citations omitted). Accordingly, Mr. Krakoff's offer to purchase the Buenos Aires, even if relied upon by the Court, would not constitute evidence of the vessel's value prior to the allision.

7. As the evidence has shown that damage to the Buenos Aires resulting from the allision was minor, the Court DENIES any award of damages for diminution in value.

8. Instead, the Court AWARDS Plaintiffs the cost of repairing the vessel:

   a. $1,225.69 for repairs already made by Colonial Yacht Anchorage pursuant to their invoice dated July 7, 1999. (Ex. 206-1.)

   b. $13,510.00 for the estimated cost of additional repairs needed pursuant to the estimate prepared by Mr. Morrison and provided by Mr. Scwhede. (Ex. 215.)

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[21] Plaintiffs attempted to present this evidence through the Engstrom survey (Ex. 212), which included a market value as equipped and a replacement value. However, the Court excluded this portion of the document because this information was beyond the scope of Engstrom's expertise. He was retained and qualified only as an expert on the damages sustained by the Buenos Aires.

C. Lost Profits Based on Purported Agreement with Mr. Krakoff to Purchase the Buenos Aires

9. In maritime law, damages for lost profits are only awarded if the amount of the loss is proven with reasonable certainty. *The Conqueror,* 166 U.S. 110, 125 (1897); *Domar Ocean Transp., Ltd. v. Independent Refining Co.,* 783 F.2d 1185, 1191-92 (5th Cir. 1986) (citations omitted).

10. Plaintiffs failed to introduce or admit any credible, substantial, legally cognizable or reasonably certain evidence regarding the amount of their alleged lost profits.

11. In addition, Mr. Benetic did not establish that the purported sale of the Buenos Aires to Mr. Krakoff could have taken place if the allision had not occurred, because it is apparent that Mr. Krakoff did not have financing for the $228,000 balance of the purchase.

12. Accordingly, the Court DENIES Plaintiffs' request for lost profits.

D. Loss of Lease Payments

13. "Under federal maritime law, loss of use of a private pleasure boat is not a compensable item of damages." *Oppen v. Aetna Ins. Co.,* 485 F.2d 252, 257 (9th Cir. 1973) (citation omitted). To recover for loss of use, the owner must prove economic damage, which in the case of a pleasure vessel has been interpreted to be loss of charter hire. *The Conqueror,* 166 U.S. at 133-34; *Snavely v. Lang,* 592 F.2d 296, 299 (6th Cir. 1979).

14. Although Plaintiffs indicated they would seek to recover for loss of lease payments, Plaintiffs did not

present any evidence of economic damage (i.e. loss of charter hire). Therefore, the Court DENIES any award for loss of lease payments.

E. Marina Fees

15. There was no evidence presented at trial on the amount of marina fees. Instead, Mr. Benetic requested during his closing argument that marina fees in the amount of $550 per month be paid for the last four years. Statements made during closing argument are not evidence.[22]

16. In addition, the injured party is not entitled to allow damages to accumulate by unreasonably refusing to attend to them. *The Baltimore*, 75 U.S. at 387.

17. Plaintiffs chose not to repair the boat. If Plaintiffs had effected repairs, presumably they would have kept the boat in its marina slip after completion of such repair. Accordingly, an award of marina fees over a four-year period is not warranted.

18. However, the Court recognizes that during the time the Buenos Aires is being repaired, Plaintiffs will have to pay for their slip or lose it.

19. Incidental, out-of-pocket costs such as unavoidable detention, dry-docking costs, towing, the wages of a

[22] Defense counsel agreed before Plaintiffs' closing argument that they would not raise any objections during Plaintiffs' closing argument due to Mr. Benetic's *pro se* status and their desire to conclude the trial. Accordingly, defense counsel did not object to this or any other statements Plaintiffs made during closing argument that were outside the scope of the evidence. Plaintiffs, in turn, did not object to Defendants' closing argument. The Court agreed to this stipulation, which allowed a courteous ending to what had been a very contentious and tension-filled trial.

crew while a ship is idle, etc. are generally compensable. *The Baltimore,* 75 U.S. at 385; *The Catalina,* 18 F.Supp. 461, 468 (S.D. Cal. 1937) (citations omitted); *The Sequoia,* 132 F. 625, 626 (N.D. Cal. 1904).

20. The Court thus finds that marina fees that will be incurred while the Buenos Aires is being repaired are compensable.

21. Unfortunately, neither Plaintiffs nor Defendants presented evidence on the length of time it would take to effect the allision-related repairs recommended by Mr. Schwede and the other experts. Plaintiffs only presented evidence that it would take six months to complete all of the repairs Mr. Benetic wanted, which included the labor intensive task of removing the inside of the boat and repairs of damage unrelated to the allision.

22. Although the Court cannot estimate with precision how long it will take to complete the repairs recommended by Mr. Schwede, the Court will allot one month for such repairs. This is generous to the Plaintiffs in the extreme, given that the Court has found it will not be necessary to remove the interior of the vessel or perform many of the other tasks identified by Mr. Carver. Mr. Carver had estimated it would take four to six employees four months or more to complete the repairs he recommended, including the 2,000 hour task of removing and replacing the interior. An allotment of one month seems a generous amount of time to complete the limited repairs that all the experts agree should be performed.

23. Despite a lack of evidence on the issue, the Court assumes for purposes of this Order that Plaintiffs' assertion that slip fees at the marina are $550 per month is correct.

24. The Court therefore ORDERS that Defendants pay Plaintiffs $550 for one month's slip fees. If this amount is in fact an overcharge, Defendants are free to submit proof of the marina's 2003 monthly slip fee, and the Court will reduce the award accordingly.[23]

F. Surveys

25. The cost of surveys completed to estimate damages or repair costs are generally compensable; however, surveys done by expert witnesses in connection with litigation are not. *Zanzibar Shipping, S.A. v. Railroad Locomotive Engine Number 2199,* 533 F.Supp. 392, 398 (S.D. Tex. 1982). *See also The Catalina,* 18 F.Supp. at 468.

26. As the testimony in this case indicates, neither Mr. Carver nor Mr. Engstrom (i.e., Plaintiffs' expert witnesses) were charged with determining the damage due to the allision. Instead, they I provided general surveys of the condition of the vessel that included non-allision damage.

27. However, Mr. Bell was charged with determining damages from the allision between the Athena Alexander and the Buenos Aires.

28. Likewise, Exhibit 208 indicates that Schulz Surveyors were tasked with determining the extent of damages caused by the allision, although no one from Schulz Surveyors was called as a witness. *See* Ex. 208

[23] The Court recognizes that the Buenos Aires could have been repaired in 1999, but will award the 2003 fees nonetheless, because the repairs will be performed in 2003 or thereafter.

("The purpose of my attendance was to determine the extent of damages reportedly caused by the . . . . Athena Alexander.")

29. Although the Bell and Schulz surveys may be compensable, Plaintiffs have provided no evidence regarding the costs they incurred obtaining them.

30. Accordingly, the Court has no basis on which to award survey costs and thus DENIES an award for those costs.[24]

G. Attorneys' Fees

31. The American Rule prohibits federal courts from awarding attorneys' fees in the absence of a statute or contract providing for a fee award: *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 247 (1975).

32. The American Rule is followed by the admiralty courts. The general rule in admiralty is that each party must bear his own attorneys' fees, absent a statutory provision, a contractual provision to the contrary or bad faith. *Galveston County Navigation District No. 1 v. Hopson Towing Company, Inc.,* 92 F.3d 353, 356 (5th Cir. 1996). "The prevailing party in an admiralty case is generally not entitled to an award of attorneys' fees, absent statutory authorization." *B.P. North America Trading, Inc. v. Vessel PANAMAX NOVA,* 784 F.2d 975, 977 (9th Cir. 1986) (citations omitted).

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[24] The Court notes it discharged Plaintiffs' obligation to pay their portion of Mr. Pfund's fees (i.e. $1,680.25) while he was serving as a court-appointed expert.

33. No contract or statute exists upon which attorneys' fees can be awarded in this case.

34. Plaintiffs did not introduce or admit any credible, substantial, legally cognizable or reasonably certain evidence justifying deviation from the "American Rule" with respect to attorneys' fees.

35. Accordingly, Plaintiffs' request for attorneys' fees is DENIED.

H. Prejudgment Interest

36. Prejudgment interest is typically awarded in admiralty cases unless there are unusual circumstances such as "undue delay in prosecuting the lawsuit." *City of Milwaukee*, 515 U.S. 189, 196 (1995) (citations omitted); *Dillingham Shipyard v. Associated Insulation Co., Ltd.*, 649 F.2d 1322, 1328-29 (9th Cir. 1981.) (citation omitted). It is left to the discretion of the court to decide whether the circumstances justify denial of such interest. *Dillingham*, 649 F.2d at 1329 (citation omitted).

37. The Court AWARDS Plaintiffs prejudgment interest as set forth below. This excludes the period of delay caused by Plaintiffs' two attempts to appeal prematurely to the Ninth Circuit.[25]

38. Prejudgment interest thus will not be awarded for the 133-day period between July 8, 2002 through November 18, 2002.

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[25] Plaintiffs filed Notices of Appeal to the Ninth Circuit of the Court's May 20, 2002 orders on May 31, 2002 and June 19, 2002. These appeals caused the case to be stayed and the trial and pre-trial dates vacated. On July 29, 2002, the Ninth Circuit issued its order indicating that it lacked jurisdiction over the appeals. The final pre-trial conference date had to be reset from July 8, 2002 to November 18, 2002.

39. The rate of interest is based on the Federal Reserve's one-year constant maturity Treasury yield. *Columbia Brick Works, Inc. v. Royal Ins. Co. of Am.*, 768 F.2d 1066, 1071 (9th Cir. 1985) ("measure of interest rates prescribed for postjudgment interest in 28 U.S.C. § 1961(a) is also appropriate for prejudgment interest"); *Western Pacific Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984) ("Although § 1961 does not provide for pre-judgment interest, it is entirely compatible with awards of such interest."). Prejudgment interest is awarded from the time of injury. *Barnett v. Sea Land Service, Inc.*, 875 F.2d 741, 747 (9th Cir. 1989). For the week prior to the allision, the Federal Reserve's one-year constant maturity Treasury yield was 5.14%.

I. Total Award -

41. The total award due Plaintiffs is as follows:

a. Reimbursement for repairs made by Colonial Yacht Anchorage in the amount of $1,225.69 (Ex. 206-1);

b. Cost of repairs as estimated by Wayne Morrison of Shelter Island in the amount of $13,510.00 (Ex. 215);

c. Prejudgment interest calculated at a rate of 5.14% from June 27, 1999 to August 6, 2003, excluding the 133-day period from July 8, 2002 through November 18, 2002;

d. One month of marina fees in the amount of $550; and

e. If the Plaintiffs have not paid the sanctions awarded to Defendant by August 6, 2003, this amount is to be reduced by $390.00.

42. Any finding of fact that is deemed a conclusion of law is incorporated by reference herein.[26]

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[26] To assist in a review of this case, the Court adds a brief summary of the events which hampered the ability of the Court to bring the case to closure within a reasonable time. The atmosphere of the proceedings was so unusual as to warrant notice.

This admiralty equivalent of a fender bender became a full-scale war, with parallel litigation, threats of arrest, alleged assaults and harassment suits. As a result, the litigation was conducted without civility and often without restraint. There are two sides to every such situation, and even while Plaintiffs were represented by counsel, heated accusations and a lack of civility were apparent. However, once Plaintiff Nicholas Benetic chose to represent himself, tensions escalated even further. The Plaintiffs accused the Court of being in conspiracy with the Defendants, filed several recusal motions and repeatedly demanded that the Court answer in writing a list of some 35 questions while calling for judicial investigations of the Court.

Throughout the case and as late as closing argument, the defense has asked the Court to find Plaintiff Nicholas Benetic a vexatious litigant. Although the request is not without merit, the Court has declined to do so to date. However, the Court does not foreclose the necessity of doing so, as it recognizes the expense and frustration necessitated in responding to Plaintiff's repeated motions for reconsideration. In fact, the Court ultimately did sanction Plaintiff in the amount of $390 for his oft-repeated motions to reconsider the arrest of the vessel.

Plaintiffs have been insistent that the Court was responsible for the repeated delays in the trial. The Court finds instead that the numerous delays were directly attributable to Plaintiffs' actions. Examples include Plaintiffs' two premature attempts to appeal this Court's rulings to the Ninth Circuit; their late attempt to add Joseph Benetic as a plaintiff, which required rounds of briefing before the Court denied it, and their repeated motions for reconsideration. The Court has tried to respond at all times with patience and with a determination to move the case forward.

Plaintiffs remain convinced that this Court is biased against them, even though this Court has no reason to recuse itself pursuant to 18 U.S.C. § 455. (*See* Plaintiffs' motions to recuse.) The Plaintiffs' filings on this point are numerous and emphatic. Because this is a meritless accusation, the Court has not recused itself or been recused.

(Continued on following page)

VI. Remedy

1. For the reasons set forth above, Defendants are hereby ORDERED to pay to Plaintiffs (1) $14,735.69 in damages; (2) prejudgment interest at the annual rate of 5.14% for the period beginning June 27, 1999 and ending on the date of this Order, excluding interest for the 133-day period discussed above and (3) marina fees of $550 within **thirty (30) days** of this Judgment. If the Plaintiffs have not paid the sanctions awarded to Defendant by August 6, 2003, this amount is to be reduced by $390.00.

DATED: August 6, 2003

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES
DISTRICT JUDGE

However, should the appellate court remand this case for any reason, this Court believes a transfer to another district judge of this Court might be appropriate. Although the Court is aware it is not the practice of the district court or the Ninth Circuit to adopt differing practices and procedures for *pro se* plaintiffs, the Court simply submits that if such a transfer lowered the level of Plaintiffs' tension and apprehension, it might in fact result in a savings of judicial, staff and security resources.

EXHIBIT C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICHOLAS J. BENETIC and SANDRA L. BENETIC, as Trustees of the Benetic Family Trust dated September 22, 1993, Plaintiffs-Appellants, v. M/Y ATHENA ALEXANDER, Official No. 1083 627 and her engines, etc., in rem; et al., Defendants-Appellees.	No. 03-56441 DC # CV-00-06845-ABC Central District, California ORDER (Filed Dec. 20, 2004)

Before: KLEINFELD, TASHIMA, and GOULD, Circuit Judges

The panel has voted to deny the petition for panel rehearing. Judges Kleinfeld and Gould have voted to deny the petition for rehearing en banc and Judge Tashima so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied. No further filings will be accepted in this closed appeal.